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# Inside

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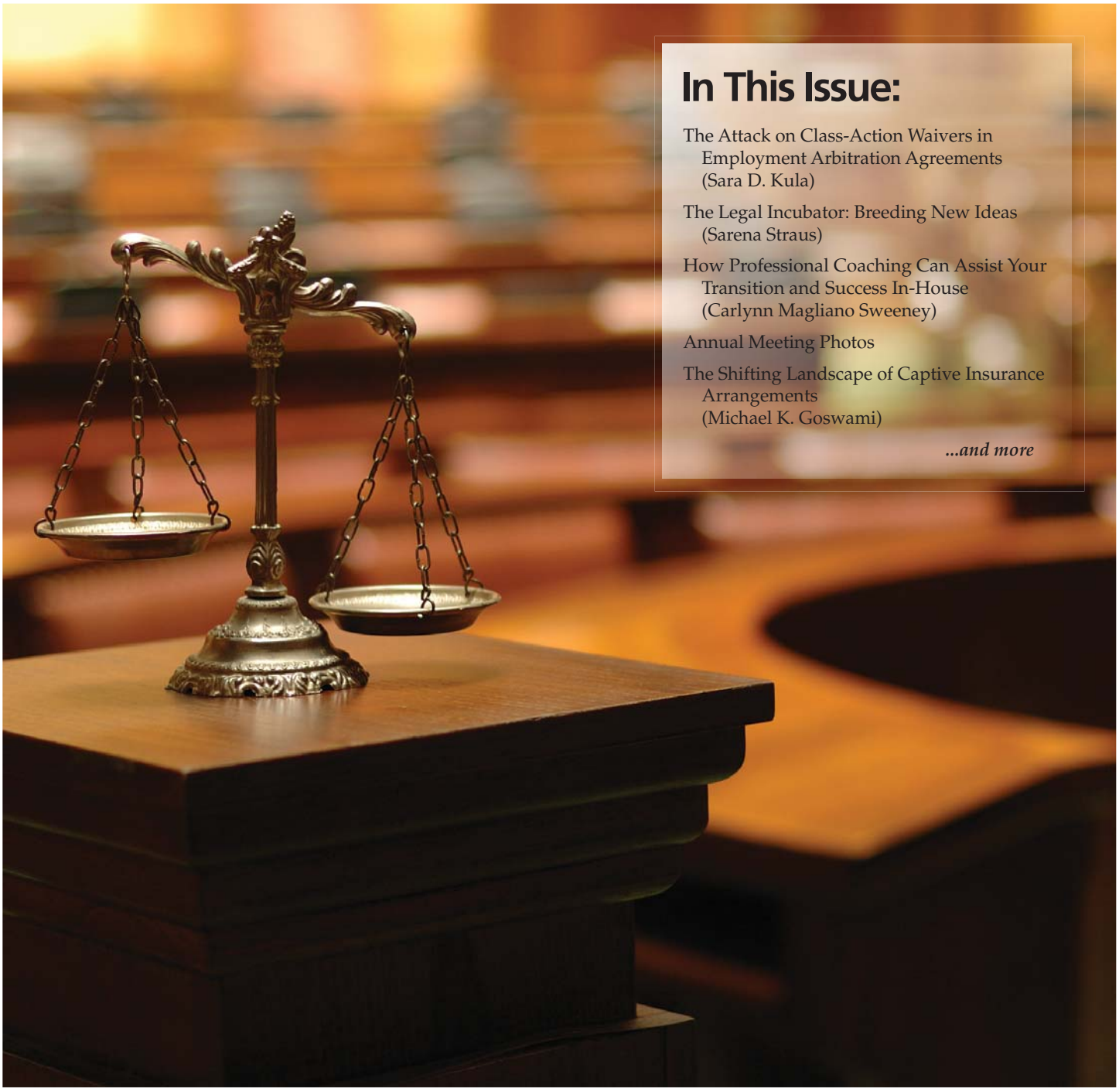


## In This Issue:

# Message from the Chair

**"Who are the people in your neighborhood?"—Sesame Street**

I am honored to be Chair of the Corporate Counsel Section this year, building off the great work our immediate Past Chair, **Jeff Laner**, started with the rollout of our Communities Section. Having access to a network of others with similar experiences and expertise is an amazing resource. If you haven't already done so, please be sure to sign up for Communities and begin to get to know your Corporate Counsel "neighborhood" and make new connections.

The Corporate Counsel Section is here for you. We take great care to create programming, design resources, and host events aimed at meeting your needs. As an upstate New Yorker (based in Albany), I am particularly interested in helping to create new opportunities to break down geographic barriers, expand connections across the entire state, and make your membership to our Section more valuable.

- We sponsored the **2017 Young Lawyers Trial Academy** in April and offered a scholarship for the weeklong program.
- We will host a membership appreciation event in New York City in May/June. We are interested in hosting additional **membership appreciation events and outings** in other locations if there is an interest!
- Our **Kenneth G. Standard Diversity Internship program** will be in full gear in late May with anticipated placements at Chubb, Salesforce, ConEdison, Alliance Bernstein, PepsiCo, Inc., and the Visiting Nurse Service of New York. This program is a crowning jewel of our Section and provides law students with the unique opportunity to learn what it is like to be "in-house" for a summer. The culmination of the program is a heartwarming and inspirational reception celebrating the interns and their host companies in August.
- Planning for our **Corporate Counsel Institute** in late Fall is also underway. This program brings distinguished speakers and highlights important topics that are of importance to all of us in our varied roles.

We recognize that our Section is a beautiful patchwork of practitioners with varied experiences and subject matter expertise. Have you thought about sharing your knowledge with others? Whether you work for a small not-for-profit, a midsized boutique, a global corporation, or something in between, you have unique knowledge that others would benefit from! Please consider sharing that knowledge by contributing to Communities, writing or suggesting articles for ***Inside***, leading a webinar on a "hot topic," hosting a coffee klatsch or happy hour, contributing as a panelist or speaker at our Corporate Counsel Institute, or joining one of our Section Committees.

I would like to thank **Elizabeth J. Shampnoi** and **Jessica Thaler-Parker** for the immense work that goes into pulling together each fabulous edition of ***Inside***. Sadly, this will be the last issue that **Jessica** will co-edit. Many thanks and gratitude to **Jessica** for all of her hard work over the past issues and we look forward to her future contributions as co-chair of our membership committee.

If you have any ideas on how we could make your membership more valuable, or if you would like to get more involved in the Section, please do not hesitate to reach out to me at jbehe@nystec.com.

**Very truly yours,**
**Jana Springer Behe**

# Table of Contents

# Inside *Inside*

It's with a mix of emotion that I am informing our membership that this is my last issue as Co-Editor of *Inside*. I have much enjoyed and learned from the challenges of that role and I am sure that **Liz Shampnoi**, and any future editors, will continue to benefit from the experience of working with numerous authors and NYSBA staff to create *Inside*.

I want to thank **Tom Reed** for first giving me the opportunity to take on this role during his tenure as Section Chair, as well as **Liz** for her collaboration and creativity—it has been a pleasure working with her. She's got an energy that is impressive and wonderful. I look forward to all future issues of *Inside* under her leadership.

This issue of *Inside* continues with the efforts of trying to have something that is of interest to everyone, regardless of specific practice. We have an interview of a practitioner and a book review as well as articles on various legal issues on topics such as remote working arrangements, captive insurance, regulatory requirements for cross-border businesses in the new administration, and a Q&A from an in-house pharma company about an incubator project that brings technology and innovation together, among others. We encourage our membership to write, send article topics and otherwise connect with Section leadership about what they'd like to see as far as events, articles, benefits or otherwise.

I hope you enjoy this, my last issue of *Inside* as Co-Editor and look forward to meeting you at future events and reading the articles you submit.

**Jessica Thaler-Parker**

I echo **Jessica's** sentiments. It has been a pleasure to work with her and she will be missed. I look forward to your feedback and input with respect to this and future topics.

**Elizabeth J. Shampnoi**

# The Attack on Class-Action Waivers in Employment Arbitration Agreements

By Sara D. Kula

No company wants to face a wage and hour class action.[1] They are disruptive, time-consuming and costly. But the risk is real. Of course, to reduce the risk of a wage and hour class action you should ensure that your company is in compliance with the numerous applicable federal, state, and sometimes even local, wage laws. But, unfortunately, that is not always enough. A rogue manager may decide to edit employees' time-cards to save money on overtime costs. Or a group of workers may claim that they weren't actually permitted to take that meal break you've been deducting time for. Or a legitimate dispute may arise concerning whether your assistant managers really are "managers" exempt from overtime after all.

With these risks in mind, more and more employers have turned to arbitration agreements with class-action waivers. These agreements are often included in new-hire paperwork and considered a condition of employment. They require employees to pursue any and all claims that may arise against the employer in arbitration on an individual basis, meaning that the employee waives his or her right to pursue any claims against the employer in court, before a jury, and as part of a class action.

*"On January 13, 2017, the Supreme Court granted the petitions for* writ of certiorari *in three cases that it will review together to determine whether class-action waivers in arbitration agreements are lawful."*

But are mandatory arbitration agreements enforceable? Well, it depends.

### Enforceability of Arbitration Agreements with Class Action Waivers

Here in New York, the answer is yes—the Second Circuit has held that class-action waivers in employment arbitration agreements are enforceable.[2] But for employers with employees in other states, the answer may vary. The circuit courts are split on this issue, creating confusion and administrative headaches for many multi-state employers.

For better or worse, clarity is coming. On January 13, 2017, the Supreme Court granted the petitions for writ of certiorari in three cases that it will review together to determine whether class-action waivers in arbitration agreements are lawful. The central issue before the Court is whether arbitration agreements with class action waivers are prohibited as an unfair labor practice under the National Labor Relations Act (NLRA or the "Act"). Typically, when we think of the NLRA, we think of unionized employees. However, Section 7 of the Act protects the rights of all employees, whether unionized or not, to engage in "concerted activities for the purpose of…mutual aid or protection."[3] And Section 8 of the Act provides that it is an "unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[4]

**Sara D. Kula is the head of the Employment Law group at DelBello Donnellan Weingarten Wise & Wiederkehr, LLP. She represents businesses in all aspects of the employment relationship, counseling clients to ensure compliance with federal, state and local laws and defending businesses before federal and state courts and administrative agencies. She also conducts employment mediations and workplace investigations. You can reach Sara at sdk@ddw-law.com.**

In recent years, the National Labor Relations Board (the "Board") has acted aggressively in scrutinizing routine employer policies for interference with employees' right to engage in protected concerted activity—attacking, for instance, employers' confidentiality policies, social media policies, and policies regarding the use of company logos and trademarks. In addition, the Board has taken the position that requiring employees to sign an arbitration agreement with a class-action waiver is a violation of the Act.

In 2012, the Board determined that "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA," and that an individual who files a class action regarding wages, hours or other working conditions is clearly seeking to initiate or induce group action, which is conduct protected by Section 7.[5] Thus, the Board concluded, a mandatory arbitration agreement which bars employees from exercising their Section 7 rights to proceed collectively constitutes an unfair labor practice.

On appeal, the Fifth Circuit disagreed. In 2013, the Fifth Circuit held that adjudicating a claim collectively is not a substantive right protected by the NLRA, and that the Board's interpretation of the Act impermissibly conflicts with the Federal Arbitration Act (FAA), which establishes a liberal federal policy favoring arbitration agreements.[6] Two years later, the Fifth Circuit reiterated

this conclusion in *Murphy Oil USA, Inc. v. National Labor Relations Board*,[7] which is one of the three cases that will be heard by the U.S. Supreme Court.

Like the Fifth Circuit, the Second and Eighth Circuits have also held that arbitration agreements with class action waivers are enforceable. The Seventh and Ninth Circuits, however, have adopted the Board's position that such agreements are a violation of the NLRA.[8] The appeals arising from the Seventh and Ninth Circuits are the other two cases that will be heard by the U.S. Supreme Court along with *Murphy Oil*.

*"If you are located in the Seventh or Ninth Circuits, you should revise your arbitration agreements while the legality issue remains outstanding."*

Applying deference to the Board's interpretation of the NLRA, the Seventh and Ninth Circuits concluded that the Act does prohibit employers from requiring employees to waive their right to pursue claims collectively. In addition, these courts found no conflict between the NLRA and the FAA because the FAA includes a savings clause, which provides that arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] Because, the courts reasoned, the FAA does not mandate enforcement of illegal agreements and because mandatory arbitration provisions are illegal under the NLRA, the FAA does not mandate the enforcement of the unlawful arbitration provisions.

## What Now?

It is now before the Supreme Court to decide the circuit split. However, the Supreme Court will not hear the matter until its 2017 term, which begins in October. It is believed that the delay was, at least in part, so that the case can be heard by a full nine-Justice court and to avoid the possibility of a four-four split. Now that President Trump's nominee, Neil Gorsuch, has been confirmed, the delay may favor employers. Of course, we can only guess what Justice Gorsuch's decision on this matter will be, but we do know that Justice Gorsuch has authored opinions in which he demonstrates a commitment to enforcing the FAA's preference for arbitration, and a skepticism regarding deference to interpretations of laws by administrative agencies.

In the meantime, the Office of the General Counsel for the Board has directed its Regions to attempt to enter into informal settlement agreements with employers charged with maintaining and/or enforcing unlawful arbitration agreements, with the settlements conditioned on the Board prevailing before the Supreme Court. If an employer is unwilling to settle, Regions are directed to go forward on those cases found to have merit. In situations involving arbitration agreements with opt-in or opt-out clauses, or where some other feature of the arbitration agreement renders it distinguishable from those found unlawful by the Board, Regions are directed to hold such cases in abeyance.[10]

## Takeaways for Employers

You may be wondering, what does all of this mean for me and my company? If your company and employees are based in New York, or anywhere in the Second, Fifth or Eighth Circuits, arbitration agreements with class action waivers remain enforceable. If you are located in the Seventh or Ninth Circuits, you should revise your arbitration agreements while the legality issue remains outstanding. For instance, including a provision whereby employees can opt-out of the arbitration requirement within a certain amount of time can save the enforceability of the arbitration agreements for those who don't take advantage of the opt-out provision. In addition, any arbitration agreement should make clear that it does not restrict an employee's right to file claims with the National Labor Relations Board. It is always a good idea to have an experienced employment law attorney review your arbitration agreement.

We will also have to wait and watch what happens with the Board under the Trump administration. There are currently two vacant seats on the Board, which Trump will be filling.[11] This is expected to result in a pro-business majority that may lead to a shift in the Board's interpretation of the law concerning class-action waivers, among other things.

At the very least, we can expect an interesting few years ahead for employers, who should watch closely as the legal landscape for employment law continues to shift.

## Endnotes

1. In this article, the term "class action" refers to both opt-out class actions under Federal Rule of Civil Procedure 23 and opt-in collective actions under the Fair Labor Standards Act, 9 U.S.C. § 216(b).
2. *Sutherland v. Ernst & Young LLP*, 726 F. 3d 290 (2d Cir. 2013); *Patterson v. Raymours Furniture Co., Inc.*, No. 15-2820-cv (2d. Cir. Sept. 2, 2016).
3. 29 U.S.C. § 157.
4. 29 U.S.C. § 158.
5. *D.R. Horton Inc.*, 357 NLRB No. 184 (2012).
6. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).
7. 808 F.3d 1013 (5th Cir. 2015).
8. *Lewis v. Epic Systems, Inc.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016).
9. 9 U.S.C. § 2.
10. NLRB Office of General Counsel Memorandum re: Impact on pending cases due to Supreme Court's grant of certiori in *NLRB v. Murphy Oil USA*, available at https://www.nlrb.gov/reports-guidance/operations-management-memos.
11. Please note that this article was submitted in April 2017 and the seats may have been filled by the publication date.

# The Legal Incubator: Breeding New Ideas

By Sarena Straus

In terms of my work life, quirky things tend to get me excited, so when just under a year ago an email arrived asking for applications to join a global legal innovations team, with no other information about what that meant, what the commitment would be or expected outcomes, it was an inbox dream come true. I fired off my application, the rocket-like Boehringer Ingelheim logo flying out of its confining circle and off into space, before we'd even received the application criteria. I'm not sure if it was my marginally creative use of PowerPoint or simply my enthusiasm that won me a spot on our six-member team, but I'm glad I did; being a founding member of the Legal Incubator at Boehringer Ingelheim has been one of the more rewarding experiences of my in-house career.

As we got the Incubator up and running and started to network with innovation leaders at companies within and outside of the life sciences industry, we realized that we are really doing something unprecedented and exciting in the in-house legal world. People from companies like Facebook and Google were telling us they'd never heard of something like this before and were excited to model the project. This was pretty sensational! It's not often that an in-house legal function at a 130-year-old, family-owned German Pharmaceutical company is accused of being cutting edge.

I (virtually) sat down with my colleagues on the team to help me explain what the Legal Incubator is, why it's so important and why we think that every legal department should have one.

**Q**: Lutz, what is the Legal Incubator and what is the mission and vision of the team?

**A: (Lutz Aye, BI Corporate Legal, Germany):** The Legal Incubator is a team of six people representing a cross section of the global legal function, including legal, compliance and business legal. We are comprised of members from our most successful markets, smaller markets and emerging countries. Our vision is to shape the Global Legal Function for the future by bringing innovative ideas to life. We do this by identifying future trends and exploring needs, by engaging with internal and external parties, by incubating innovative concepts and initiatives, and by being a role model for innovative thinking**.** We also have a charter that guides our interactions—everything from be bold, to not being too judgy or allowing for analysis paralysis. We even have our own Mascot named Cubi, who authors many of our communications. We want to accomplish things but we also want to keep it fun, so that people will want to engage.

**Sarena Straus is a Director and Senior Counsel II at Boehringer Ingelheim Pharmaceuticals, where she counsels the compliance organization, and also provides counsel on marketed and developmental products, including in the rare disease space. Ms. Straus was featured for an "Inside" interview in our Winter 2016 issue.**

**Q**: Whose idea was this? How did you get started?

**A: (Matthew Sharps, Business Legal, Austria):** Credit for the idea really goes to a prior team that was put together to develop a vision for the Global Legal Function in 2025, partially to address the outcomes of a survey regarding legal department resources. We were already doing some innovative things here in legal, especially around legal tech, such as creating our own smart-contracting tool, but this was a next level suggestion—form a team within the Global Legal Function that will prepare us for the future. From there, our General Counsel, Martin Schwarz, had this idea for a legal incubator team. Beyond that, we weren't really given any guidance other than to be bold in our ideas, think far into the future, and, this is a direct quote, "Don't tell me I need a better matter, contract, billing or knowledge management system, I already know that—this is what any General Counsel gets to hear from consultants." So, really, this was green fields.

**Q**: I guess what people will want to know is, what is the output? Why is this important?

**A: (Andreas Lenk, BI Corporate Legal, Germany):** When other companies are putting together their own legal incubator teams, the format, size and output might be different. For us, we came up with these really bold concepts, some that aren't actionable items, but more visionary, first for our department and eventually, hopefully, for our company. Then we back-peddled. We asked ourselves what we can begin to do now to build toward that vision of our future. Our next job, this May, will be to present actionable items to our global leadership team for approval to create implementation teams to begin to execute. It was important to us to have things we can do now to move toward our visions. We can't just say that in fifteen years we want to be this without doing something now to move us toward that goal. We'd lose interest and momentum and it would never happen. In June, we will announce those ideas that we are launching to the entire Legal Function of 280 people, when we all come together in Lisbon, Portugal.

**Q:** Visionary but not actionable? What does that mean?

**A: (Andreas):** I'm not sure we want to give all of our secrets away, but there is this one thing that we think about: how do we become the pinnacle of innovation and excitement, the place everyone wants to work, the sexiest company, how do we get people to love us like that? It's not actionable, but it's a vision we can build toward. What do we have to do in order to be perceived as an exciting place to work, a place that will draw the best talent? We spoke to people at companies that are known for being visionary and places people really want to work, like Google, Facebook and LinkedIn, and asked how they approach keeping their own people engaged and excited—how are they so successful about getting people to care about the company and want to protect it? We thought about what categories were critical toward moving to this goal and then broke it down into People, Technology, Environment, and Delivery of Services. We explored each of these areas and came up with bold and exciting, but actionable, ways of building toward our vision for the future.

**Q:** So what happens if you go to the leadership team and they give you the thumbs down on all of your ideas? Will this be a failure?

**A: (Matthew):** I don't think so. We feel pretty strongly that the endeavor in and of itself is worthwhile for a lot of reasons. The establishment of the Legal Incubator and the interactions we have with the Global Legal Function alone already started promoting a mindset of innovative thinking amongst our colleagues. Also, it's giving us fantastic exposure to people inside and outside of our industry. It's allowed us to network in a way that we can leverage for the department and for the company, but also in ways that are important to our personal growth. It's also giving us much broader exposure and a more comprehensive understanding of our own department—who we are, what we do, what's important to us now and in the future. That said, I don't believe they will say no to our ideas. We have ideas that are more long term, complicated and possibly expensive, but we also have ideas that can be implemented now, with little work and at little or no cost. They are really no-brainers.

**Q:** Laura, you are the self-proclaimed team millennial. Can you give us a sneak peak at one of your ideas and why it's going to be important in attracting millennials?

**A: (Laura Coll, Compliance, Spain):** For millennials, we want to know why is this a good job for me. Money and benefits aren't the most important things to us. We really care about quality of life. We have this idea that we are calling EBT 4.0—or Extended Business Trips. EBTs aren't a novel idea. Within our company, many people will go to other parts of the business to work for some time. Within legal, we send people to other parts of the world for anywhere from 6 months to several years. We thought, okay, we can also expand our internal EBTs and have people from within the legal function sit with the business or for people in the business to sit in legal, but that was thinking small. We wanted to think outside of our four walls. We have people from law firms come to us sometimes to cover maternity leave and the like, why not send our people to firms to strengthen in areas of interest or need. Or why not even send them to other companies, or to work in government or with regulatory authorities? We have this idea that we can't do something like this because we all have secrets, but people move around industry all of the time and it's part of our obligation to maintain confidentiality. Why not do company swaps? Maybe a company like Facebook wants to learn more about the pharma industry and we need to understand social media marketing better—we could swap employees. The ideas of EBT 4.0 expand way beyond that, but you get the idea. Now we are talking in a way that is appealing to millennials—it's good for the company and for individual growth.

**Q:** Mariam—How important was it for us to have someone on the team from an emerging market?

**A: (Mariam Talia, Compliance, South Africa):** I think this was super critical to our success. In pharma in particular, there is a huge focus on market potential, but beyond that, it's the diversity on our team that has really made us successful. I come to our discussions with a really different mindset. First of all, I'm not a lawyer, I'm a pharmacist working in compliance. But I also come from a part of the business that is much more resource strapped and therefore efficiency driven. We were supposed to be asking really big questions and for me, a really big question was whether we will even need a compliance function in ten years. How much will technology be able to replace some of the things we currently do for the business, like monitoring? Will there be a time when the business can monitor itself?

**Q:** Will there be?

**A: (Mariam):** I don't know. I hope so. It kind of brings us back to our vision about wanting to be an exciting place to work at—a place that people seek out for employment. Right now, pharma compliance is very much about the stick and not the carrot. We are very policy and enforcement driven. But if we can move more toward a future where people are self-monitoring, self-reporting and compliant because they really care about protecting the company and its people, maybe compliance can be more self-sustaining.

**Q:** How do you accomplish that?

**A: (Lutz):** Well, this is really what the Legal Incubator is about. We are helping move towards a future where out-of-the-box thinking and striving for innovative legal solutions is part of our daily routine. We are helping to make our function a place where people will want to work and that will provide them with a rewarding and exciting experience. In a way, it's self-fulfilling prophesy—the incubator in and of itself is a big first step towards our vision.

What's next for the incubator? In addition to preparing to propose and launch our first projects, we are working to institutionalize the incubator as a permanent part of the Legal Function. Our goal is that the team will always be learning and networking and have a constant influx of fresh talent and ideas. We are also in the initial stages of planning legal innovations roundtables in the U.S. and Germany to facilitate innovative thinking amongst legal in-house functions and to help cross-germinate ideas. Our hope is that this concept will catch on and that we'll be able to network and collaborate with legal incubator teams in other companies.

We'd be happy to share questions and ideas with you, to talk to you about forming your own legal incubator, and perhaps even meet you at our first of what we hope will be many roundtables. Please contact us at zzLEGCubibox@boehringer-ingelheim.com.

**Lutz Aye is the Head of Legal for the Therapeutic Area Biosimilars at the Boehringer Ingelheim Corporate Center. He was also part of the predecessor initiative to the Legal Incubator, the "Legal Roadmap 2025".**

**Matthew Sharps is Senior Legal Data Manager at Boehringer Ingelheim RCV where he focuses on using data to help support and drive better decision making and resource allocation in his region. He also supports large scale cross-organizational projects.**

**Andreas Lenk is a Legal Counsel at Boehringer Ingelheim and advises the Innovations Unit in legal matters related to research and development of innovative medicines.**

**Laura Coll is a member of the Boehringer Ingelheim compliance team in Barcelona, Spain.**

**Mariam Talia is a pharmacist with 23 years of experience in the pharmaceutical industry in both the public and private sectors. She joined Boehringer Ingelheim last year, where she implements BI compliance elements into the South African business.**

# Utilizing a Smart Phone "App" to Protect Companies and Individuals in Critical Law Enforcement Encounters: M&M Defend™

By Steven D. Feldman

White collar defense attorneys are regularly confronted by new clients who seek representation where the client has told some version of his or her story to law enforcement agents before ever meeting with counsel. While *Miranda* warnings, aimed at providing prophylactic cautions to individuals,[1] are ubiquitously disseminated throughout our society, in practice people generally relay an entire story to law enforcement officials without preparation, without prior consultation with counsel, and without being accompanied by a lawyer to protect their interests. Of course, where an individual is not subject to custodial interrogation, there is no obligation for law enforcement agents even to provide *Miranda* warnings.[2]

*"Agents often ask to come into the individual's home, and the individual complies both to avoid seeming rude and to avoid the spectacle of a law enforcement agent standing on the door step."*

Law enforcement agents are aware of our general human nature to be helpful, and know that a lawyer will almost always counsel a client to exercise caution before meeting with law enforcement agents and relating his or her story. The FBI Special Agents and other law enforcement agents use these predilections to their advantage and will often appear at a client's home early in the morning—often before 7:00 a.m.—to ask questions before attorneys are at the office and available to take calls.[3]

Once these interview sessions begin, they do not end easily. While an agent may initially claim that he or she will only ask a few questions, each question naturally leads to another, and the agents will falsely (but legally) claim to need just one more question answered before the interview is completed.[4] Agents often ask to come into the individual's home, and the individual complies both to avoid seeming rude and to avoid the spectacle of a law enforcement agent standing on the door step. Once the agent is inside, it is no longer possible to simply shut the front door if the individual wants to end the conversation. Rather, the individual has to prevail upon an armed law enforcement agent to leave the home, all while the agent is trying to convince the individual to answer just a few more questions.

These situations are fraught with risk for the individual, even for those innocent of wrongdoing, as agents may erroneously conclude that an innocent person is lying, and therefore committing a new offense of providing false statements in an official investigation.[5] These can be life changing encounters.

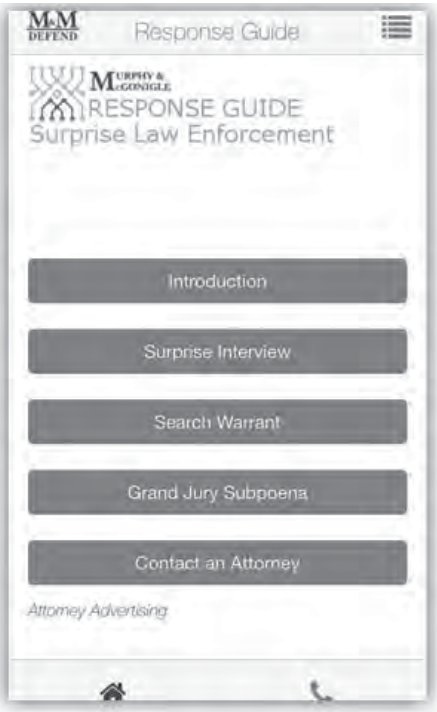
*"Once on location, however, law enforcement agents may use their access to an office or warehouse as an opening to obtain voluntary consent to search other locations not covered by the search warrant, or as opportunities to question employees on site."*

Similarly, companies and individuals are at risk when law enforcement agents seek to execute search warrants at an office, warehouse, or home. Search warrants are appropriately issued where a magistrate judge finds that there is a fair probability that contraband or evidence of a crime will be found in a particular place.[6] A search warrant often permits law enforcement agents to seize paper documents as well as copy computer hard drives for review off-site in the future.

Once on location, however, law enforcement agents may use their access to an office or warehouse as an opening to obtain voluntary consent to search other locations not covered by the search warrant, or as opportunities to question employees on site. Desiring to be cooperative, and unaware of their rights and the risks inherent in these situations, employees may consent to searches outside the scope of the search warrant, or submit to interviews with law enforcement agents without counsel present. However, armed with guidance about their rights and permissible strategies to respond, individuals and companies can make educated decisions in these stressful circumstances.

It was these and similar situations that provided the impetus for the creation of a free "app" for iPhone and Android smart phone users called "M&M Defend." The M&M Defend app provides guidelines for critical interactions with law enforcement focusing on: (1) surprise interviews and encounters with law enforcement agents; (2) government execution of search warrants at a warehouse, office or home; and (3) receipt of grand jury subpoenas by a business or individual. It contains bullet points provid-

ing guidance on these subjects, along with expandable sub-bullets offering additional insights.




At the critical moment, if law enforcement agents appear at an individual's home front door or otherwise seek to question the individual while he or she is away from the office, the individual will not have access to information stored on an office computer or in a file cabinet. Similarly, an office or warehouse manager may not easily locate written guidance while facing down law enforcement agents at the doorway demanding to immediately execute a search warrant. While this kind of legal information could be conveyed to clients via traditional means, such as print brochures or handouts, the limitation of the traditional format is that the information is stored in a drawer, file cabinet, or desktop computer – not on a smart phone carried in the employee's pocket.

*"Lawyers are exploring new ways to deliver legal services, from proprietary databases to smart phone apps. Through the proprietary databases, lawyers seek to support their legal advice with more than anecdotal experience by leveraging big data analytics."*

By placing the information literally at the employee's fingertips via a free app stored on the individual's smart phone, the individual has access to educational information and generic guidance that informs the individual of his or her rights, and provides general knowledge about


law enforcement practices in these situations. Of course, as the app explains, generic guidelines are no substitute for individualized advice from an attorney. Each situation will differ, and the guidelines recommend that individuals should, as soon as practically possible, seek out the advice of company in-house counsel or appropriate outside legal counsel to guide the individual through these critical encounters. But before it is possible to connect with counsel, the app can provide important guidance that can help prevent the individual from unknowingly waiving crucial rights or unnecessarily consenting to intrusive state action.

The app consists of five sections: (1) an introduction; (2) guidelines to respond to a surprise interview request from law enforcement agents; (3) guidelines to respond to the execution of a search warrant at an office or home; (4) guidelines to respond to a grand jury subpoena; and (5) attorney contact information, including attorney cell phone numbers and email addresses. The app works on both the iPhone and Google Android devices. It is available for free at the Apple iPhone App Store under the name "M&M Defend" and on the Google Play store under the same name. To date, more than 400 people have downloaded the app.

The M&M Defend app was launched as part of a mission to serve clients in new ways as technology fundamentally transforms the way lawyers and their clients do business. Lawyers are exploring new ways to deliver legal services, from proprietary databases to smart phone apps. Through the proprietary databases, lawyers seek to support their legal advice with more than anecdotal experience by leveraging big data analytics. The M&M Defend app was created with these principles in mind.

By providing individuals with this crucial legal information that they can store on their smart phones and access in emergency situations, individuals will be better equipped to make knowing decisions when determining how to interact with law enforcement officials, when to waive their rights, or how to assert their rights.

## Endnotes

1. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).
2. *See Ill. v. Perkins*, 496 U.S. 292, 297 (1990).
3. *See, e.g., United States v. Mittle-Carey*, 493 F.3d 36, 38 (1st Cir. 2007) (noting law enforcement agents arrived at defendant's home at 6:25 am to execute search warrant and question defendant; when asked by defendant whether he should get a lawyer, law enforcement agent told defendant that "if he got an attorney, the attorney was going to tell him not to speak to the FBI").
4. *See, e.g., United States v. Kontny*, 238 F.3d 815, 817 (7th Cir. 2001) ("Trickery, deceit, even impersonation do not render a confession inadmissible, certainly in noncustodial situations and usually in custodial ones as well, unless government agents make threats or promises.").
5. *See* 18 U.S.C. § 1001.
6. *Ill. v. Gates*, 462 U.S. 213, 238 (1983).

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Inside Books

# *The Dream of Reason: A History of Western Philosophy from the Greeks to the Renaissance*

Written by Anthony Gottlieb
(Norton, 2016; 450 pages)
By Janice Handler

Fellow readers, have you ever stayed awake at night wondering if there is out there a book of intellectual history that is lively, witty, readable, and exciting? If so, this is the book for you.

I have to confess that I am an intellectual wannabee—someone who really wants to read the great stuff but only if it is readable and fun. (So much for Aristotle.) So no surprise that this was one of my favorite books this year—and yes (I'm glad you asked) it does have relevance for lawyers.

*"Far from being a discrete and single subject that could be placed neatly on an academic map, philosophy, in some historical periods, covered nearly every branch of learning that did not come under theology."*

Anthony Gottlieb is a British writer and former Executive Editor of *The Economist*. While he has held visiting fellowships at All Souls College, Oxford, and Harvard University, and taught at the CUNY Graduate Center and the New School in New York, he is primarily a **writer**, and this may explain why this book is so darn good.

*The Dream of Reason*, first published in 2000, is a survey of intellectual thought from the Greeks to the Renaissance, focusing primarily on ancient Greek philosophy. (In 2016, *The Dream of Reason* was joined by a sequel, *The Dream of Enlightenment*, W. W. Norton & Company, Inc., 2016, which continues the story from Descartes to the beginnings of the French Revolution.)

Succinct explanations of Gottlieb's theme ("that there is no such thing as philosophy") as well as his methodology and coverage appear on page one of the introduction—along with his refreshing sense of humor.

> I set out to look at the writings of those from the past 2600 years who are regarded as the great philosophers of the West. My aim (politely described by friends as "ambitious" when they often meant "mad") was to approach the story of philosophy as a journalist ought to; to rely only on primary sources, wherever they still existed; to question everything that had become conventional wisdom; and above all to explain it all as clearly as I could.

But as he plowed through early Greek philosophers, Socrates, Plato, Aristotle, Roman Stoics, whom he called "intellectual therapists," Medieval mystics, "logic obsessed" monks, medieval scientists and theologians, and Renaissance "magicians, visionaries, grammarians, and engineers," Gottlieb found "philosophy" unraveling before his eyes. Far from being a discrete and single subject that could be placed neatly on an academic map, philosophy, in some historical periods, covered nearly every branch of learning that did not come under theology.

Rather than being a concrete body of knowledge, philosophy came to be understood by Gottlieb as a way of thinking by a sharply inquisitive cast of mind. He notes, for example, that Aristotle divides all thought into only two categories, theologi (supernatural) and physici (naturalist).

*"Using this technique, Socrates pursued the question of how one should live and the role of the virtues—courage, moderation, piety, wisdom, and justice—in that process."*

Quoting William James' definition of philosophy as a "peculiarly stubborn effort to think clearly," Gottlieb concludes that, while this definition is dry, it is "more nearly right than any other I know." He then sets out to follow *The Dream of Reason* (the attempt to push rational inquiry, obstinately, to its limits) from the 6th Century B.C. to the Renaissance. A tall order. But he succeeds brilliantly. Starting with the pre-Socratic Greeks' attempts to establish intellectual order wherever it was lacking and ending

with Descartes' complete intellectual overthrow of the principles of inquiry, Gottlieb offers lucid and charming capsules of the lives and thoughts of philosophers important and less so (with perhaps a bit too much attention to the latter). Socrates, Plato, and Aristotle will ring familiar bells, but you can also dine out on Empedocles, Anaxagoras, and Pseudo–Dionysius (who knew?) for a long time.

*"A student of Socrates who was horrified by his death under a democracy, Plato, in The Republic, elaborated on an ideal form of government run by philosopher kings, trained from birth in communal environments for this role."*

As lawyers, we will find of particular interest the very comprehensive section on Socrates, which will be illuminating for those of us who believe that the Socratic Method was invented by one of our particularly sadistic law professors. Socrates, labeled by Gottlieb as the "saint and martyr" of philosophy, was obsessed with righteous living and self-examination. But unlike many saints and martyrs, his faith relied not on revelation or blind hope, but on a devotion to argumentative reason, leading to his characteristic method of interrogation, now known as the Socratic Method, whereby, instead of proposing a thesis, one lets the other guy do so, then draws out its consequences. Using this technique, Socrates pursued the question of how one should live and the role of the virtues—courage, moderation, piety, wisdom, and justice—in that process.

Also of special interest in these times of political turmoil is the chapter on Plato. Unless you are a serious student of philosophy, you can skip the esoteric discussion of Plato's forms and go right to his views of democracy (spoiler alert: he's not a fan!). A student of Socrates who was horrified by his death under a democracy, Plato, in The Republic, elaborated on an ideal form of government run by philosopher kings, trained from birth in communal environments for this role.

*"Each of these schools, in its own way, believed that the key to wisdom is in knowing what not to care about."*

While most of us are familiar with this concept, there are surprises in the details. Women, for example, could rise to the highest levels along with men (although Plato was no feminist!). And Plato viewed democracy as the road to aimless chaos and the seeds of tyranny, a thought that may resonate in this age of global populism!

Those of you who have read my previous reviews on Stoic philosophers will not be surprised that my favorite chapter is "Three Roads to Tranquility," which explores the Epicureans, Stoics, and Sceptics—the guys who were the Doctor Phils of their times and whose advice actually has relevance for living your life. Each of these schools, in its own way, believed that the key to wisdom is in knowing what not to care about. Whether you favor the Epicureans, who focused on ethical pleasures and freedom from distress; the Stoics, with their attitudes of resigned self-acceptance; or the Sceptics, who aimed to suspend judgment on each question in order to stop worrying about it, there is material here you can use to find your own road to tranquility.

*"Whether you are interested in Big Questions or small chuckles,* The Dream of Reason *will not disappoint."*

There are many books of intellectual history out there—what makes this one special is the clarity of its ideas, the charm of its biographies, and the humor that resonates on every page, starting with the preface, where Gottlieb says of philosophy," Any subject that is responsible for producing Heidegger, for example, owes the world an apology."

My only quibble with this book is a lack of balance in its coverage. Aristotle gets 70 pages; the entire Renaissance gets 25. This, however, is a minor failing in a book so readable, comprehensive, and comprehensible. Whether you are interested in Big Questions or small chuckles, *The Dream of Reason* will not disappoint.

**Janice Handler is the former Editor of *Inside* and former General Counsel of Elizabeth Arden. She is an adjunct Professor of Law at Fordham Law School.**

# Collaborative Practice: Efficient Dispute Resolution for In-House Counsel

By Marc Sheridan and Anthony Markus

The ability of in-house counsel to resolve interpersonal conflict internally and externally is paramount. Nowadays, an in-house lawyer wears many hats, whether it is dealing with an HR issue, competing business needs among department heads, or cultivating relationships with outside vendors. The role of in-house counsel is becoming one of problem solver and business partner. Success will continue to be measured on his or her ability to resolve disputes efficiently and expeditiously. Indeed, in-house counsel are frequently required to seek alternative fee arrangements, explore cost-effective and better methods to retain relationships, maximize shareholder value, and minimize risk; it is clearly an evolving role. With this background, dispute resolution professionals have realized that they too need to change how their skill sets are utilized by in-house counsel both before and after a dispute arises. Meet Collaborative Practice—the evolution of dispute resolution.

## What Is Collaborative Practice?

Collaborative Practice (CP) is a revolutionary solution-oriented approach to resolving disputes. The cornerstone of CP is that in the event of a dispute everyone agrees—the parties, lawyers, and other professionals—that they will resolve the matter without litigation. The paradigm shift for collaborative counsel is to maintain their advocacy while working together with the other professionals to help the parties solve their problem, avoid collateral damage, and achieve a win-win outcome.

*"At this juncture, there is a collaborative practitioner in virtually every state in the U.S., every province in Canada, and in 24 other countries around the world."*

The CP Process begins by each side retaining a collaborative attorney to help the parties negotiate an agreement on all issues. Each attorney is trained in interest-based negotiation and mediation. Unlike a mediator, each lawyer functions as a counselor-at-law for his or her respective client, responsible for helping the client's identify and advance their own interests and develop settlement options through a structured interest-based negotiation. The CP Process also involves the retention of other non-legal neutral professionals. These could include communication specialists/facilitators, accountants, appraisers, financial advisors, and business consultants. The addition of these neutral professionals allows the parties to deal with the emotion and focus on the business elements of a dispute, break through impasse, and reach resolution without creating the traditional battle of the experts.

CP has its roots in family law. Stu Webb, a Minnesota family lawyer, is credited with its creation in 1990, in an effort to come up with a better way to resolve divorce and custody cases while minimizing the emotional damage to the parties and their children.

*"This information exchange allows all involved to have an honest dialogue about each party's perspective and the risks involved, and minimizes adversarial negotiation."*

From its modest beginnings in Minnesota, CP has become a global phenomenon in family law, resulting in the creation of the International Academy of Collaborative Professionals (IACP). Over the last decade, CP has branched out into other non-family areas, including joint venture and partnership formation and disputes, employment, probate, and medical error matters leading to the formation of the Global Collaborative Law Counsel. Law schools have jumped on the bandwagon too, offering courses in CP.[1] Businesses are increasingly incorporating it as part of their internal dispute management systems. At this juncture, there is a collaborative practitioner in virtually every state in the U.S., every province in Canada, and in 24 other countries around the world. There are 239 practice groups world-wide, 175 of which are in the U.S.[2] The Uniform Collaborative Law Act has now been adopted in 16 jurisdictions.[3]

## How Does Collaborative Practice Work?

CP negotiation is conducted in a series of private face-to-face settlement meetings outside of court with the parties and Collaborative professionals. At the first meeting, the parties enter into a contract called a Participation Agreement, in which they agree to exchange pertinent information to facilitate settlement talks and avoid the traditional discovery battles. This information exchange allows all involved to have an honest dialogue about each party's perspective and the risks involved, and minimizes adversarial negotiation. In contrast to liti-

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gation, the attorneys have an affirmative duty to share information and correct mistakes so that the parties are fully informed should they not reach a mutually acceptable settlement.

If the parties cannot resolve the matter, both attorneys (and any neutrals) withdraw from representation, because the collaborative attorney has a focused retention as settlement counsel; there is no eye towards litigation. This preserves the advocacy of counsel in the collaborative process while maintaining the parties' focus on settlement. The withdrawal provision preserves the integrity of the CP process.

### Why Should My Company Use Collaborative Practice?

CP's benefits are unmatched by any other dispute resolution method. It restores communication and preserves relationships in a confidential setting, protects business interests by inviting creative solutions, and returns control of decision-making to the parties (indeed there is no third-party decision-maker). Time and cost are also dramatically reduced. By way of example, in the divorce arena, the average litigated divorce takes 17 months. The average collaborative divorce is completed within 17 weeks, and is generally a third of the cost of fully litigated divorce.[4] An IACP 2010 survey of 933 cases highlights its effectiveness. Of those 933 cases—86% were successfully resolved and only 11% were terminated; 14% of the cases resolved in less than 3 months; 44% of the cases required only 7 months to settle, 58% in less than 9 months, and 79% in less than a year.[5]

*"Similar to the prenuptial, maintaining a company's longterm relationship with a key distributor, outside vendor/ subcontractor, or embarking on a joint venture requires a careful assessment by in-house counsel."*

There are also inherent advantages to the collaborative process in business cases. Unlike litigation, parties avoid business interruption; there are no e-discovery costs, no motion practice, and no management or key employee depositions, or trial testimony. The neutrals are not "hired guns"; instead, they allow parties to diffuse emotion, understand the financial landscape, and encourage communication to facilitate rational and informed decision-making.

### The Business Pre-Nuptial—What Else Can Collaborative Divorce Teach Us?

CP's success in the prenuptial setting should also not go unnoticed by in-house counsel. The traditional process of entering into prenuptial agreements often entails the following pattern. The spouse who believes he or she has the greatest to lose and often under pressure from other family members such as parents or children from a prior marriage—has his lawyer prepare a draft agreement protecting his interests and sending it to his fiancé's lawyer for review. Typically the draft agreement sets forth terms such as limitations on separate property and support and directives to vacate the "marital residence" in the event of divorce as well as waivers of spousal estate rights in the event of death. What follows are a series of letters, draft agreements and negotiation between lawyers *without the parties ever having discussed their interests or views concerning these critical issues*.

*"Undoubtedly, it would have avoided the collateral damage of substantial financial and reputational exposure to both parties. Indeed, Swatch's chief executive stated that he still considers the failed partnership with Tiffany to be a 'missed opportunity.'"*

Rather than beginning the process with a draft agreement, in the collaborative process the parties first engage in face-to-face meetings where they are encouraged and assisted by their respective collaboratively trained attorneys to express their respective interests and concerns and *to actively listen to the other's views before a single word of the agreement is drafted*. Not only do they address the financial issues as to divorce and estate matters, they also discuss other important facets of the marital relationship such as relationships with stepchildren where applicable, spending, savings, retirement and time dedicated to work and leisure. This process of face-to-face meetings, open discussions of important issues, advice as to divorce and estate law and full disclosure of finances, enables the parties to enter into an informed, durable binding agreement that represents both their interests and compromises to place them on sound footing to enter into their marital relationship and sets in motion an

effective process to return to if they encounter challenges during the relationship before it escalates into irreconcilable differences.

Similar to the prenuptial, maintaining a company's long term relationship with a key distributor, outside vendor/subcontractor, or embarking on a joint venture requires a careful assessment by in-house counsel. Often these business relationships require the parties to act in good-faith, shift liability risk, and include indemnity or fiduciary obligations.[6] As with entering into a prenuptial agreement, companies can benefit from the collaborative process as a best practice. Facilitated discussions by trained collaborative business counsel to address common and divergent interests at the outset will help the parties better understand risk, achieve compromise before problems arise, and more importantly, set in place procedures to address challenges that may develop during the joint venture, even before the agreement is formalized.

*"With Collaborative Practice, parties now have direct involvement in decision-making, supported by a team of neutral professionals who are trained with the sole focus of helping the parties restore communication and reach creative and reasoned business solutions in less time and at a lower cost."*

Take the example of well-publicized failed joint venture between Swatch Group Ltd. (Swatch) and Tiffany & Co. (Tiffany). In 2007 Swatch entered into a joint venture to manufacture watches that would be marketed bearing the luxury Tiffany brand name. Shortly thereafter, communications broke down and the joint venture terminated with Swatch claiming that Tiffany failed to make watches a priority of its business and Tiffany claiming Swatch failed to respect the brand management and design.[7] The parties arbitrated the claim, and in 2013 a Netherlands panel awarded Swatch $449.5 million in damages, more than Tiffany's total profits in 2012.[8]

Had Swatch and Tiffany committed to the collaborative process it is likely that either an agreement would have been achieved that more accurately reflected their respective interests, or at least assisted the parties in managing expectations. Undoubtedly, it would have avoided the collateral damage of substantial financial and reputational exposure to both parties. Indeed, Swatch's chief executive stated that he still considers the failed partnership with Tiffany to be a "missed opportunity."[9]

## Conclusion

As the role of in-house counsel continues to expand, utilizing effective conflict resolution processes is becoming a necessity. Collaborative Practice offers a roadmap for in-house counsel to reach the intersection of business and legal interests. With Collaborative Practice, parties now have direct involvement in decision-making, supported by a team of neutral professionals who are trained with the sole focus of helping the parties restore communication and reach creative and reasoned business solutions in less time and at a lower cost.

In the words of Abraham Lincoln:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.[10]

## Endnotes

1. *See*, *e.g.*, David Hoffman, Legal Profession: Collaborative Law, Harvard Law School (Fall 2016).
2. *See* IACP website, http://www.collaborativepractice.com.
3. Robert J. Merlin, *The Long and Winding Road to Implementing the Uniform Collaborative Law Act and Rules in Florida*, *Dispute Resolution Magazine,* American Bar Association Section of Dispute Resolution, Winter 2017, volume 23, number 2, at p. 13.
4. Stephanie Coontz, *Separate Peace*, Wall Street Journal, June 6, 2008, at W11.
5. IACP Practice Survey (July 2010), https://www.collaborativepractice.com/media/82192/IACP_TTl.pdf.
6. *Plumitallo v. Hudson Atlantic Land Co.*, 74 A.D.3d 1038, 1039, 903 N.Y.S.2d 127, 129 (2d Dep't 2010).
7. Tiffany & Co., Current Report (Form 8-K), at p. 2 (March 12, 2012).
8. Raphael Minder, *Swatch Wins Case Against Tiffany Over Failed Partnership*, N.Y. Times, December 23, 2013 (Business Day). The companies continue in litigation. In 2015 the arbitration award was set aside by a Dutch court, which has been appealed, and the parties are awaiting decision from the higher court.
9. *Id*.
10. Abraham Lincoln, *Notes for a Law Lecture*, July 1, 1850.

# *Inside* Interview

## Mitch Borger

**Vice President, Assistant General Counsel**
**Macy's, Inc.**

Conducted by Arthur Shalagin

**Mitch Borger**

Mitchell F. Borger is Vice President, Assistant General Counsel, for Macy's, Inc., the iconic department store chain that includes Bloomingdale's. After graduating from Albany Law School of Union University, Mitchell started his career as an Assistant District Attorney in the Office of the Bronx District Attorney. For most of Mitchell's tenure there, he prosecuted child abuse and domestic violence crimes. In 1987, Mitchell began his in-house counsel career as a litigator for the New York Power Authority. In 1992, Mitchell moved to a generalist position at United Merchants & Manufacturers, Inc., a textile company that has since dissolved.

In 1995, Mitchell joined Federated Department Stores, Inc. (which in 2007 rebranded itself into Macy's, Inc.) in its New York Regional Office, handling employment, operational and loss prevention matters, along with the supervision of litigation. In 2006 Mitchell was promoted to manage the company's in-house Litigation Team and was responsible for the management of the Company's uninsured litigation process. In February 2012, Mitchell's responsibilities reverted to employment, where he is currently a manager in the Employment Group, responsible for matters in the eastern half of the U.S.

Mitchell is a past Chair of the New York State Bar Association's Corporate Counsel Section and has been a member of its Executive Committee since 1999. In 2010-11, he was a member of the New York State Bar Association's Committee on Standards of Attorney Conduct. In 2011-12, Mitchell chaired a Commercial & Federal Litigation Section Working Group which issued a Report on "Faster, Cheaper, Smarter Litigation Practices." He has been a past speaker on topics such as emerging issues in employment law, retail loss prevention training, corporate public relations in the electronic age, litigation management, workplace violence prevention and corporate policy drafting. Mitchell's speaking engagements have included guest lectures at Fordham and Brooklyn law schools, National Retail Federation Loss Prevention Conferences, New York State Bar Association Annual Meetings, Federal Bar Association Fashion Law Conferences, International Association of Defense Counsel, and numerous other continuing legal education sanctioned conferences.

**Q** You began your legal career as an Assistant District Attorney in the Bronx, and have dedicated the rest of your career to serving as in-house counsel in various companies, including most of your career at Macy's. Do you think this is a typical career path for an in-house lawyer to take? How did being an ADA prepare you for your first in-house role at the New York Power Authority and for subsequent in-house roles?

**A** My career path is not typical, as most ADAs move on to firms that specialize in personal injury defense or criminal defense work. I do know of a handful of others who left the prosecutor's office directly into an in-house setting, but it seems to be the exception rather than the norm. My experience in the Bronx DA's Office was valuable and I am to glad to have had that opportunity. The Bronx courts in the mid-1980s were truly the trenches of courtroom litigation and I learned how to think and react quickly on my feet, especially in front of a judge and jury. I also began to learn the art of negotiation and persuasive argument. I tried a dozen jury trials and another five bench trials to verdict. While prosecuting child sexual and physical abuse cases was emotionally demanding, it taught me a whole other level of empathy and desire to fight for the downtrodden and victimized.

**Q** What were some of the challenges you faced when transitioning between different in-house positions and internally between different legal teams at Macy's?

**A** The biggest challenge was moving from litigation to a generalist in-house role. There is certainly a discernible difference between criminal and civil litigation. With criminal, you have less brief writing and more courtroom experience, while civil litigation is spent mostly on the discovery process and then writing the dispositive motion. However, the significant difference was transitioning

from litigation to general counseling work. When I left litigation at the New York Power Authority I needed to learn the textile business of my new company, along with the substantive areas of employment, contract, real estate and trademark. Once you learn the in-house generalist role, the particular company and business doesn't change your work very much. That said, don't underestimate learning the difference in cultures between different corporations. Handling litigation for those first many years has given me the ability to counsel from the standpoint of protecting the client from future litigation.

**Q** What are some of the critical skills you developed in-house and how did they help you become a successful in-house attorney? How has your outlook on being an in-house lawyer changed the way you problem-solve in a large organization like Macy's?

**A** The key skills necessary to thrive in-house are learning your clients' business, being easy and responsive to deal with, keeping things simple, evaluating risk and explaining how to minimize those risks, avoiding legal ease and displaying strong common sense. It is important to remember that, unlike at law firms, we are considered support services that don't generate revenue, so the lawyers are not that important in the overall scheme of things. Also, small egos do better, because it is all about making your client look good.

**Q** Macy's is a renowned retailer and you been there for over 20 years. What's the best thing about working at Macy's?

**A** Everyone knows the Macy's brand and what it stands for, the landmark/flagship store (Miracle) on 34th Street, quality merchandise, the Independence Day fireworks, the Flower Show surrounding the Easter holiday and, of course, the Macy's Thanksgiving Day Parade. I have been personally involved with the Parade for the last 22 years. One year I served as a celebrity escort for the musical group Chicago (they referred to me as "Mr. Macy's"), ten years I marched as a clown and for the last eleven years I have worked behind the scenes to help supervise the 1,000 clowns—from wardrobing and makeup downtown at a hotel and uptown behind the starting line. I am referred to as the "In-house Legal Clownsel." I am part of the team that places the clown groups into the right place in the line of march. If you think herding cats is hard, try herding clowns!

**Q** What is the one thing that most surprised you about the role of an in-house counsel? How does your legal role interact with Macy's other business departments?

**A** The biggest surprise is what I write and how I write is different than I expected. I never write briefs or lengthy memos. My clients want short, to-the-point communication. I rarely write anything more than two pages long and mostly it is less than a page. My clients want to know if they can make a business decision under consideration and what risks are associated with it. During my tenure at Macy's I have dealt most with the Human Resources, Asset Protection and Parade Departments, with much of the HR counseling related to the company's many stores.

**Q** You have been very involved with NYSBA and other organizations over the years, serving as past Chair of the New York State Bar Association's Corporate Counsel Section. What inspired you to get involved with legal and retail industry organizations and how has it impacted your professional and personal life?

**A** It was a combination of things. On one hand, I wanted to find a way to give back to the profession. On another hand, I wanted to meet other in-house counsel. I have formed some wonderful friendships through NYSBA and the Corporate Counsel Section. Through the years, I have met law students participating in the Section's Kenneth G. Standard Diversity Internship Program, along with several attorneys starting out, who I have been able to help mentor. I am a huge believer in "pay it forward" and hope that I have helped others who will continue to give going forward.

**Q** There has been a recent trend of in-house legal departments hiring attorneys straight out of law school, and training as junior in-house counsel (for example, Hewlett-Packard and Pfizer[1]). How has this affected your role as Vice President/Assistant General Counsel at Macy's, and what do you think this means for the legal market (in particular, large firms, which serve as a launch-pad for many in-house attorneys)?

**A** Macy's does not usually hire recent law school graduates. I think it is hard to do for a small or mid-sized law department which experiences low turnover. In the right situation, with adequate internal training practices, it can be mutually beneficial and allow for hiring of high potential law school graduates. Macy's merged with May Company in 2005 and May Company had such a program. I met a number of May attorneys who were hired that way and they were terrific lawyers who had a deep understanding of their clients' business.

**Q** What advice would you give to law students and junior attorneys about breaking into an in-house counsel

role? What advice would you give to mid-level attorneys or for those lateraling into in-house roles?

**A** First, as a law student, seek out in-house internship opportunities. As for junior attorneys, try to learn and be comfortable in a few substantive areas. Most companies have needs in the areas of employment, transactional work (contracts), intellectual property and technology/privacy. Also seek out opportunities to work directly with clients and not just behind the scenes at law firms. Also seek out charitable, pro bono work as well. All of this will help make you more marketable for an in-house position.

**Q** What do you like to do in your free time?

**A** For many years I played competitive basketball, but after 25+ years of pretending to be a weekend warrior and the growing number of injuries, I retired. I enjoy long walks with my wife and our two dogs (Corgis). I also dabble in photography and enjoy making photo albums of vacations and family celebrations.

### Endnote

1. http://www.insidecounsel.com/2012/03/01/some-law-school-grads-head-directly-in-house?slreturn=1490746057.

**Arthur Shalagin is a bilingual, tech-savvy, law school graduate with commercial transaction, Venture Capital and Private Equity outreach experience looking to build on his transactional experience while connecting your practice to New York's startup and tech ecosystem.**

**He is currently a volunteer law clerk to the General Counsel of the Urban Resource Institute, whose mission is to provide quality, compassionate, and innovative client-centered services to victims of domestic violence and other vulnerable populations so that they may lead the safest and fullest lives possible.**

**Arthur is an active member of NYSBA's Corporate Counsel and Business Law Sections. He has organized a panel on Cryptocurrency regulation for NY Legal Hackers Meetup and spoke at Yale's 2016 Leadership Summit on corporate and IP law issues. He also is the author of a blog post on corporate and intellectual property law issues for startups titled *New Year, New Venture: 13 Steps to a Legally Compliant, New You!***

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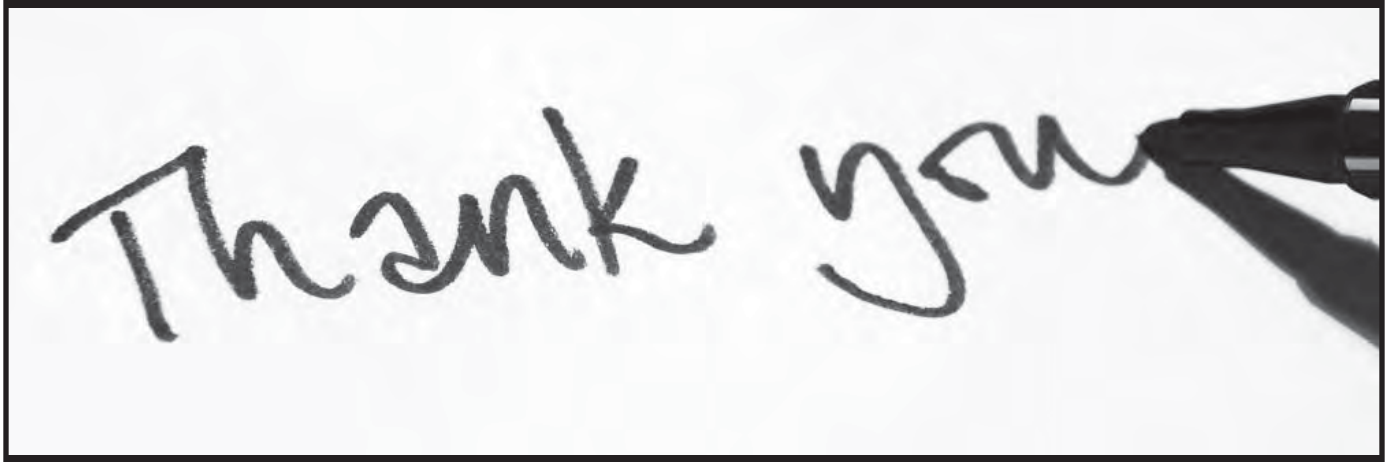


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Claire P. Gutekunst
*President*

NYSBA

# How Professional Coaching Can Assist Your Transition and Success In-House

By Carlynn Magliano Sweeney

The GC of a mid-size company was recently seeking help with a junior attorney on his team. The GC saw potential in this junior—possibly even to be his successor. The junior was bright, hardworking, and had terrific industry experience. The junior attorney, however, had some quirks that needed to be addressed. First, the junior attorney's communication style was "relaxed." While this style worked with the company's former CEO, the new CEO had a more polished approach and the junior needed to adjust to fit his style. Second, the junior seemed to have some anger management issues—there had been three incidents where he had raised his voice in the office. Lastly, the GC mentioned that the junior needed some guidance on office attire. He had come to the office wearing bleached jeans and an untucked polo shirt. Overall, the GC said that the junior simply did not have the communication skills and "presence" to take on a leadership role within the organization. While the junior was well-liked by his peers, the GC thought that the business leaders at the company would struggle to relate to him.

*"Lawyers usually gain the necessary legal skills to move in-house by putting time in private practice—very often in large, heavily leveraged law firms."*

While the GC had delivered performance reviews throughout the years, the reviews had focused largely on his legal abilities and not these soft skills that needed fine-tuning. The GC felt that the junior could benefit from an objective third party to assist him with these abilities.

Enter professional coaching.

While professional (or "developmental") coaching has been an integral part of professional development initiatives in many industries, it is a relative newcomer in the legal sector. There is a pervading idea that legal expertise is sufficient to get ahead. However, it's not enough to just be a "good lawyer" anymore. Lawyers need business acumen, communication skills, and management abilities above and beyond their legal skills in order to succeed.

Lawyers usually gain the necessary legal skills to move in-house by putting time in private practice—very often in large, heavily leveraged law firms. While large firms are excellent training camps for "good lawyers," they often don't have the time or resources to focus on their associates' soft skills development. Moreover, a junior or mid-level associate at a large firm is usually focused on keeping his or her head down and churning out excellent work product—not on refining soft skills. When lawyers make the move in-house, they need to start focusing on achieving success in a totally new climate—one where success is not linked to the billable hour.

For many lawyers, moving to an in-house position is the holy grail. Once in-house, lawyers want to thrive in this new role, and often have the support of the organization to continue with their professional development. Professional coaching has been a successful way of assisting in-house lawyers with learning certain soft skills that are required of them in this new setting. Fortunately, unlike the lawyering skills developed through years of training in private practice, these soft skills are attainable in a relatively short amount of time when working with a qualified professional coach.

Here are some FAQs about coaching for in-house lawyers:

- What does professional coaching address?

Professional coaching addresses issues that can impact an individual's career. It is for individuals who want to elevate their performance, increase their personal and professional happiness, and gain skills that are necessary for their success. For example, coaching supports an individual's efforts in building and sustaining positive relationships, enhancing management skills, improving internal and external communication, and maximizing business development. Coaches work with clients to define goals and complete projects.

- Why should an attorney engage in professional coaching?

Professional coaching is used by in-house legal professionals for a wide variety of issues at many stages of their career. Attorneys who have made the move in-house will seek coaching for communications, time management, and people management issues. Attorneys are excellent candidates for coaching because it uses a personalized, "one-on-one" approach, and gives the lawyer the chance to take the lead on determining one's own solutions through a process of asking questions.

- Who are professional coaches?

Most professional coaching is carried out by qualified people who work with clients to improve their effectiveness and performance and help them achieve their full potential. Coaches can be hired by clients or by their organizations. The engagement works best when everyone clearly understands the reason for hiring a coach and when they jointly set the expectations for what they want to achieve through coaching.

Managers and leaders within the organization can also be effective professional coaches. Managers don't have to be trained formally as coaches. As long as they stay within the scope of their skill set and maintain a structured approach, they can add value and help develop their people's skills and abilities.

*"We are often hired by management teams interested in keeping on or promoting high potential employees."*

- When should coaching be engaged?

In some organizations, coaching is still seen as a corrective tool, used only when things have gone wrong. But in many companies, coaching is considered to be a positive and proven professional development tool. We are often hired by management teams interested in keeping on or promoting high potential employees.

- How does the coaching relationship work?

While there is a wide variety of ways to approach the coaching relationship, the most common relationship is for a set amount of time (3, 6, 9, 12 months) of individual, one-on-one counseling with a professional coach. The coach is most often paid for by the employer, and there is an understanding of confidentiality between the coach and the employee. If you are unsure about whether your employer offers professional coaching, contact your HR department.

- Where will coaching get our junior attorney in the above example?

To return to the initial example, professional coaching addresses all of the things that were preventing the junior attorney from reaching success in his in-house role, and increase his chances of being promoted to GC. A coach would assist by co-constructing and defining the junior attorney's specific goals and objectives, formulating a plan that would use the junior attorney's skills to achieve these goals, hold the junior attorney accountable for progress, and provide structure, encouragement and support.

If you're curious about professional coaching, see about setting up a conversation with a qualified coach by contacting your HR department. Most coaches will meet with potential clients to help them determine if coaching would be beneficial for their professional development.

**Carlynn Magliano Sweeney is the Managing Director of Preferred Transition Resources, a legal career coaching and counseling company based in New York. Carlynn and her team frequently work with lawyers seeking to move in-house and in-house counsel on achieving their professional goals.**

# NYSBA 2017 Annual Meeting Business Law and Corporate Counsel Section Meeting

Corporate Counsel Section
Chair Jana Behe


Business Law Section Chair
Sarah Gold welcoming attendees



Moderator David L. Glass
of Macquarie Group Ltd.
introducing speakers

Business Law Section Program Chair
Kathleen Scott welcoming attendees

Thomas Baxter. Esq., Sullivan & Cromwell; formerly
General Counsel and Executive Vice President
of the Federal Reserve Bank of New York

Prof. Bruce A. Green, Director of the
Louis Stein Center for Law and Ethics
at Fordham Law School

H. Rodgin Cohen, Senior Chairman,
Sullivan & Cromwell


The panel discussing ***The Attorney's Role in Promoting a Strong Corporate Culture***

NEW YORK STATE BAR ASSOCIATION

If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor:

Elizabeth J. Shampnoi
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*Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.*

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# JOIN A COMMITTEE

## Corporate Counsel Section Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment. However, all appointments are subject to availability. Details concerning each of these committees are available from the Corporate Counsel Section's portion of the NYSBA website, www.nysba.org/corporate.

___ Continuing Legal Education and Meetings (CORP 2200)

___ Diversity (CORP 2500)

___ INSIDE/ Publications (CORP 2400)

___ Membership (CORP 2600)

___ Pro Bono (CORP 2700)

___ Technology and New Media (CORP 2800)

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## CLE/Corporate Counsel Institute

### By Steven Nachimson and Howard Shafer

The Section will be presenting its Sixth Corporate Counsel Institute in New York City on November 2 and 3. This program is specifically designed to meet the needs of corporate counsel, and will offer a variety of cutting edge CLE programs presented by leading private practitioners and corporate counsel. Previous editions of this program have drawn a sellout crowd. Be sure to save the dates on your calendar and plan to register early. The planning committee includes **Anne Atkinson, Mark Belkin, Mitch Borger, Steven Nachimson, Howard Shafer**, **Elizabeth J. Shampnoi** and **Sanoj Stephen**. If you would like to serve on the planning committee, please contact **Steven Nachimson** at steven.nachimson@compass-usa.com or **Howard Shafer** at hshafer@shaferglazer.com.

## House of Delegates

### By Natalie Sulimani

On No Fools, April Fool the House of Delegates convened in Albany. First, I want to thank **Ms. Jana Behe** for her years of service on the House of Delegates for the Corporate Counsel Section. Her participation has been invaluable and she has passed on her enthusiasm for the delegates to come.

While there is much activity at the House of Delegates, here is the activity to note from the President's Initiatives. Due to the recent rise in the need of legal representation of immigrants and the need for training on matters related to immigration, the New York Bar Foundation has granted $40,000, with an equal commitment from the Association, that will focus on developing a portal for pro bono volunteers, mentors and service providers to get connected.

In February 2017, the Association launched its online referral platform, Legal.io. Go check it out and get yourself registered.

The Domestic Violence Initiative has three active subcommittees in which there are training programs, developing strategies addressing gaps in the provision of legal services and a legislative subcommittee preparing three bills supporting those affected by domestic abuse.

We also saw some results from the Membership Challenge…drumroll please…Corporate Counsel Section is in the lead, so THANK YOU ALL FOR YOUR MEMBERSHIP!!!

For more information, please see **Claire Gutekunst's** April 2017 President's Report to the House of Delegates. You can always watch live.

The House of Delegates is a great way to be active in the Association but you must be active in your Section. Ask us how you can get more involved, join our Executive Committee meetings and all of our programs. It is amazing to see what your peers are doing to give back to the community at large. If you want to get involved, contact **Natalie Sulimani** at satalie.sulimani@provintl.com, **Elizabeth J. Shampnoi** at elizabeth@shampnoiadr.com or **Jana Behe** at jbehe@nystec.com.

## Kenneth G. Standard's Diversity Internship Program

### By Dave Rothenberg

2017 is our 12th year pairing up diverse law student interns with paid opportunities inside legal counsel's offices at for-profit and not-for-profit entities. As the Chair's message notes, we again have great companies hosting students. Despite a budget for two students where we share the students' expense, we will have eight students this year in the program due to the generous sponsorship of the companies who fully pay for a student. This is in addition to us fully supporting a student at the Bar Foundation for a fellowship at a not-for-profit organization. If your organization has an interest in being a part of the program please contact me at 212-357-2368 or email me at David.Rothenberg@gs.com.

After this year the program will have hosted close to over 70 students. Clearly the program, with **Ken Standard's** active involvement, is the most successful NYSBA internship opportunity. Be a part of our drive to provide more opportunity to students—many whom have never been in a corporate office and many whom are first-time graduate students in their family.

Every year we hold a reception in August to honor everyone involved, especially the organizations that provide their time and resources for the students. Kaplan Bar Review will once again help sponsor the reception. They provide one intern randomly drawn at the reception a free New York Bar review course. Kaplan also will provide six other interns $1,000 to $1,500 gift certificates toward the Bar review course.

Finally, Kaplan sponsors the photographer at the reception. Please look out for this free event to attend or contact me to get an invite.

Finally, we are always looking for volunteers as this is a yearlong operation. We are looking for people to work with the law schools to keep the pipeline of students robust. We are looking for someone to spearhead our efforts to keep the 70 students in touch. Many of our former interns are on the Executive Committee and serving as officers of the Section. So join the movement.

## Membership

### By Joy Echer, Thomas A. Reed and Jessica D. Thaler-Parker

Your Section's Membership Committee is pleased to report that as of March 1, 2017 there were 1610 lawyers enrolled in the Corporate Counsel Section. We anticipate that this number will decrease on April 1st, when the State Bar officially drops from its rolls those attorneys who have not renewed their membership for 2017. Your Committee is already working on ways to attract new members this year to keep our Section vital and flourishing and is in the early stages of planning member-related events and initiatives such as the very successful Member Appreciation and Networking receptions we have sponsored in prior years. You will hear about these plans as they take final form.

This year we are redoubling our efforts in order to meet the State Bar's Membership Challenge initiative, in which each of the Sections is tasked with increasing both its membership size and its member retention rate by a certain amount each year through 2020. If you are a Section member and would like to work with the Membership Committee to help us meet and beat this challenge by offering your ideas and suggestions, please contact our Section Staff Liaison, **Adriana Favreau**, at afavreau@nysba.org, and she will alert one of us on the Committee to be in touch with you. We very much welcome your suggestions and potential participation.

## Pro Bono

### By Barbara Levi

I have been leading the Section's Pro Bono Committee with **Anthony Fong** and **Joe Deleo**. As a starting point, the committee is addressing the threshold issue of insurance, and what steps can be taken to educate members about unintentionally exposing themselves to liability. An article on this topic is being considered for a future edition of *Inside*. Once the threshold issue of insurance is addressed, the committee will explore what, if anything, NYSBA can do to provide coverage for members who want to provide pro bono legal service but are not covered by their employer's policy for work outside the company's business. The committee also plans to see what information may be made available to members about getting involved with Pro Bono activities. If you are interested in joining the Pro Bono Committee, please contact **Adriana Favreau** at afavreau@nysba.org or **Barbara Levi** at blevilankalis@gmail.com.

## Tech and New Media

### By Natalie Sulimani

Want to star in your own webinar? Now is the chance to educate us on your area of practice as it pertains to the Corporate Counsel Section. The Tech and New Media Committee is looking for content. Contact **Natalie Sulimani** at natalie.sulimani@provintl.com to find out about putting together a webinar, roundtable, CLE, etc.

## Young Lawyers

### By Kenneth Zweig

As the Young Lawyers Section (YLS) liaison to the Corporate Counsel Section (CCS) my goal is to act as a tunnel making sure information and opinions of value are getting in and out. My first responsibility is to be the mouthpiece of the Young Lawyers Section. Everything the YLS wants to accomplish and things that would be beneficial for the YLS I will work for through my position in the CCS to accomplish.

As young lawyers, our first order of business is to get a job. To accomplish that I will work with members of the CCS to find opportunities that young lawyers can take advantage of that they wouldn't otherwise be privy to. One of the mottos I abide by is, "I'm not concerned with the things I don't know, I'm concerned with the things I don't know I don't know."

Secondly, after getting some money in their pocket, young lawyers are concerned making sure they have worthwhile careers that they enjoy getting up for every day. So my goal is to put young lawyers in a position to learn do's and don'ts and get tips from members in the Corporate Counsel section.

Thirdly, I want young lawyers to be on the front lines of making substantive difference within the NYSBA by proposing both substantive and procedural changes in favor of young lawyers. The NYSBA is a voluntary organization, there is no requirement that any lawyer in New York State be a member. Those people who have become actively involved are striving to be an integral member of the profession and have influence on the legal profession here in New York. As the liaison, that is my goal—to get things done for the people I represent, my so-called constituents, the Young Lawyers Section. You can reach me at (212) 883-5608 or kjzweig@gmail.com.

# Is Easy or Difficult Collaboration More Productive? The Answer May Surprise You

By Andrea S. Kramer and Alton B. Harris

In-house lawyers inevitably do a lot of collaborating—with their colleagues, the business people in their organizations, and outside counsel. Their success is often a reflection of just how successful their collaborations are. So, it is worthwhile to look at when and why collaboration is at its most—and least—effective.

Collaboration initially appears to be an unambiguously positive activity: by working together—collaborating—we can accomplish something "better" than anything we can accomplish on our own. But collaboration takes many forms and not all of them are more productive than individual initiative. To understand when collaboration is positive and when not, let's look at two quite different approaches a business can take in structuring its collaborative teams, depending on whether it values similarity (commonality and unity) over difference or it values difference (diversity and dissent) over similarity.

## The Similarity Mindset

Many businesses encourage team members—collaborators—to think of themselves as sharing common goals, beliefs, and characteristics, to interact with one another "blind" to their social differences (such as race, gender, and ethnicity), and to seek to arrive at a common perspective on the problems at hand.

*"When social diversity is inserted into the collaboration process, our expectations change."*

A business with such a "similarity is good" mindset will strive to maintain a workplace culture that is as homogenous as possible. When we work with people who are like us—whatever "like" may mean—we typically experience conflict-free exchanges, we quickly achieve consensus, and we move easily to the next project. People collaborating at businesses that stress this sort of workforce commonality tend to get along better, display more trust and cooperation, and enjoy themselves more than people on socially diverse teams.[1] Moreover, studies confirm[2] that interjecting social diversity into previously homogenous teams can cause discomfort, rougher interaction, interpersonal conflict, less cohesion, and more disrespect.

Given these findings, valuing similarity over difference has a great deal to be said for it—if a business's prime objective was to assure that its teams were cohesive, conflict-free, and smooth functioning. But a business's prime objective ought not to be conflict-free collaboration, but an increasing bottom line. And increasing profits depends on collaborative teams being diligent, innovative, and creative–characteristics that are promoted by diversity, not uniformity.

**Andrea S. Kramer ("Andie") and Alton B. Harris ("Al") are accomplished experts in their respective fields of law and adjunct professors at Northwestern University School of Law. They have both served in senior management positions and have in-depth experience with all aspects of personnel management including recruiting, hiring and firing, individual and team supervision, compensation, and promotion. For more than 30 years they have worked to promote gender equality in the workplace. Learn more at www.andieandal.com.**

## The Diversity Mindset

During the early years of the last century, the Lower East Side of New York City was a place of blooming, buzzing diversity: Germans, Italians, and Eastern European Jews were present in large numbers with many Greeks, Hungarians, Poles, Romanians, Russians, Slovaks, and Ukrainians sprinkled in among them.[3] Living conditions were not great, but the energy, vibrancy, and dynamism of the place was undeniable. As a symbol of an approach to collaboration, the Lower East Side stands for the realization that while diversity can lead to conflict, it can also—when present in the context of shared purpose—produce more thoughtful deliberation, better decision making, and more creativity than can uniformity, similarity and commonality.

*"But precisely because it is harder work, we do it more carefully, we pay more attention, and we care more about getting it right."*

When we collaborate with people who are "like" us, we assume (unconsciously) that we will easily understand one another, immediately recognize where others are coming from, and quickly reach agreement. When social diversity is inserted into the collaboration process, our expectations change. We are forced to work harder to

reach consensus. Indeed, research[4] shows that when we hear a contrary or dissenting view from someone who is not "like" us, we work harder to understand their point of view than we do when the same dissent comes from someone who is "like" us.

In other words, when our collaborators are different from us, we need to engage in more difficult cognitive and emotional activity to get the job done than we would as homogenous collaborators. This increased difficulty is the source of both the negative and positive aspects of valuing diversity over similarity. When collaborating with socially diverse people, we are not as comfortable as we are when collaborating with people who are like us; it is harder work and fraught with the possibility of conflict. But precisely because it is harder work, we do it more carefully, we pay more attention, and we care more about getting it right. Consequently, collaboration done in the context of social diversity results in much better outcomes than can be achieved in the context of commonality.

*"The economists found that shifting from an all-male or all-female office to an office evenly split along gender lines increased revenue by roughly 41 percent."*

Two recent studies provide strong support for this "no pain, no gain" conclusion about collaboration. In the first study,[5] the researchers conducted a series of mock trials with six-person juries made up either of all white persons or of four white and two black persons. The diverse juries were found to be decidedly better collaborators: they considered the case facts more carefully, made fewer errors in recalling relevant information, and displayed a greater openness to discussing the role of race in the case. The researchers concluded that these improvements in the deliberation process occurred because *in the presence of diversity* the white jurors were more diligent and open-minded.

In the second study,[6] two economists analyzed the data from a professional services firm with more than 60 offices worldwide. The firm had some all-male offices, some all-female offices, and some mixed-gender offices. The economists found that shifting from an all-male or all-female office to an office evenly split along gender lines increased revenue by roughly 41 percent. As to why this happened, the lead author offered a baseball analogy.[7] "A baseball team entirely composed of catchers could have high esprit de corps…But it would not perform very well on the field."

*"Collaboration in the presence of social diversity may be more difficult than collaboration in the presence of similarity, but it produces greater team productivity—and a better bottom line."*

A business that consciously strives to assure that collaboration takes place in the presence of social diversity may be giving up the easy, comfortableness we feel when we are dealing with people "like" us. But what it gives up in the way of "comfortableness" will be more than made up for by a collaboration process that

- is more careful and diligent (diversity kicks us into cognitive high gear);
- has more useful information brought to bear on the task at hand (a diverse set of collaborators means a diverse set of skills and perspectives), and
- has teamwork marked by a greater degree of vibrancy, dynamism, and creativity (think the Lower East Side of New York City).

Collaboration in the presence of social diversity may be more difficult than collaboration in the presence of similarity, but it produces greater team productivity—and a better bottom line.

## Endnotes


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# The Shifting Landscape of Captive Insurance Arrangements

By Michael K. Goswami


### Executive Summary

This article gives an overview of the legal landscape surrounding captive insurance companies in 2017. Regulations from the prior administration are now effective and it is uncertain what will become of the regulations under the new administration. However, careful review by corporate counsel may highlight industries in which captive arrangements might be beneficial for clients.


*"Yet, many small- and medium-sized businesses and taxpayers do just that—they form a separate entity which has the sole purpose of insuring differing risks for a primary party (or parties)."*

### Manuscript

The economic upswing following the Great Recession of 2008 has been a boon for business owners of all industries. Now that the 2016 election cycle has come to a conclusion, your guess as to future economic performance is as good as mine. For this reason, among others that existed prior to shifting of administrations, many business owners are concerned with protecting their interests in the uncertain commercial landscape.

When business owners begin thinking about protection of economic interests, coverage with insurance policies is always a primary thought of a well-diversified protection plan. However, most taxpaying owners of small- and medium-sized businesses do not consider *entering* the insurance industry to be a viable business venture.

*"A captive insurance company is an insurance company formed by a business or business owner which has the purpose of insuring the risks of the business or affiliated businesses."*

Yet, many small- and medium-sized businesses and taxpayers do just that—they form a separate entity which has the sole purpose of insuring differing risks for a primary party (or parties).[1] These types of arrangements can be generally described as "captive insurance companies," "micro-captive insurance companies" or "§ 831(b) captives" (all referred to synonymously as a "captive" throughout this article).


**Michael K. Goswami focuses his practice on corporate and business planning, securities, mergers and acquisitions, real estate, and wealth management.**

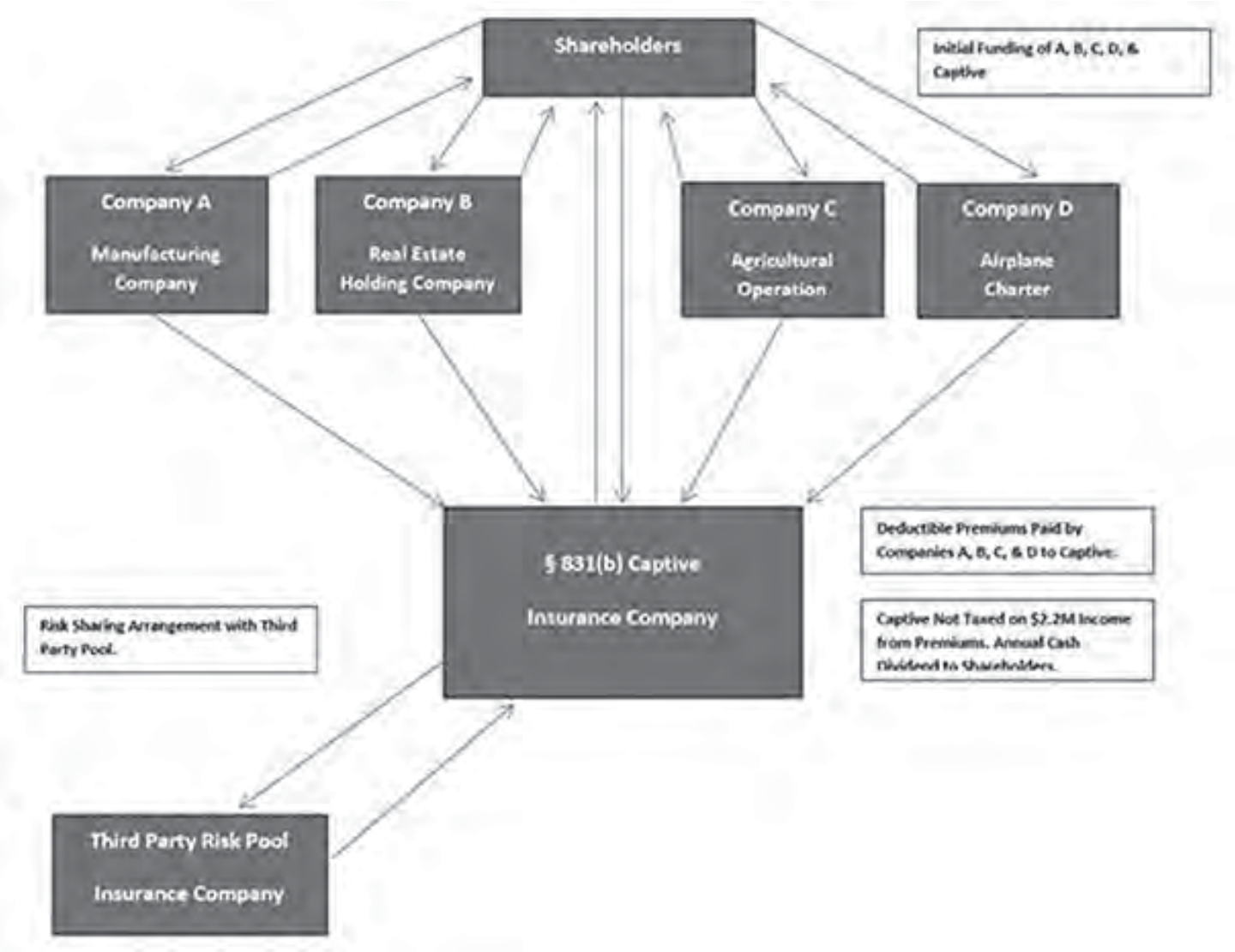

In the past few years, captives have been in the private and governmental spotlight. Amidst growing popularity, the Internal Revenue Service (the "IRS") placed captive structures under the microscope as a 2016 "Dirty Dozen" transaction.[2] New regulations, which became effective in January 2017, restricted the immense tax benefits of utilizing a captive insurance arrangement and also implemented new reporting requirements. This article discusses a general overview of captives and the regulations affecting captive structures as of January 2017.

A captive insurance company is an insurance company formed by a business or business owner that has the purpose of insuring the risks of the business or affiliated businesses.[3] Captives are licensed and operate subject to insurance industry regulations.[4] They are, in fact, real insurance companies. However, at the fundamental level, a captive arrangement is deductible self-insurance shifted to another entity owned by parties affiliated with the entity seeking insurance.

*"Alternatively, the funds may be invested until the end of the insurance contract between the captive and the insured. The real value from the $2.2 million exclusion shows up at the distribution phase—held premium payments and accumulated investments can be declared as a taxable dividend to the shareholders of the captive insurance company."*

A captive can take on various forms, ranging from the most elementary to overtly complicated structures. The captive company can be created as a domestic entity or an offshore entity, each with its own benefits and drawbacks. To visualize the concept, a representation of a simplistic captive structure is provided in Figure 1 below.

**Figure 1: Simple § 831(b) Captive Structure**




One of the most substantial benefits of using a captive is the income exemption provided by 26 U.S.C. § 831(b). Currently, the income exemption contained in § 831(b) allows a qualifying captive insurance company to exclude, for tax purposes, net income from premium payments so long as the captive receives no more than $2.2 million per year in premiums.[5] Assuming the captive stays below this ceiling amount, the captive is taxed only on *investment* income for the taxable year at the rates found in 26 U.S.C. § 11(b).[6]

*"Of course, the transaction must be* bona fide *in order to receive the tax benefits."*

If structured properly, the insured company receives a tax deduction for the insurance premium paid to the captive insurance company (similar to any other insurance premium paid to a regular insurance provider that would be deductible under 26 U.S.C. § 162). The paid premiums then remain as a static "rainy-day" fund with the captive insurance company for potential claims. Alternatively, the funds may be invested until the end of the insurance contract between the captive and the insured. The real value from the $2.2 million exclusion shows up at the distribution phase—held premium payments and accumulated investments can be declared as a taxable dividend to the shareholders of the captive insurance company.

Of course, the transaction must be *bona fide* in order to receive the tax benefits. The insurance contract between the captive and the insured must be an arm's-length transaction and meet the requirements promulgated by the IRS. The captive must be an "insurance company," and the agreement between the captive and the primary company must constitute "insurance."

For tax purposes, an insurance company is defined as a company "more than half of the business of which during the taxable year is the issuing of insurance or annuity contracts."[7] To qualify for deductibility under 26 U.S.C. § 162, a contract transaction under which an insurance premium is made must exhibit adequate "risk shifting" and "risk distribution" properties.[8] If these properties are not present, the IRS may disallow the claimed deduction for the payment of insurance premiums to the captive, eviscerating the keystone benefit a taxpayer seizes by using an § 831(b) structure.

*"It is not difficult to see how the first diversification provision can severely limit the amount of premiums that can be paid to the captive while staying within the regulations."*

The IRS has taken note of the rise in popularity of § 831(b) captives over the last few years. In response, Congress passed the 2015 PATH Act,[9] which altered, beginning January 1, 2017, the permissible structures of existing captive arrangements and those yet-to-be-formed. Generally, the IRS is concerned with claimed deductions by the insured taxpayer that do not meet the definition of insurance, because this might allow escape from certain tax liability.[10]

Accordingly, in order for previously formed captives to continue to utilize the § 831(b) election or for future captives to use the election, the IRS requires more concrete "diversification" compared to previous years.[11] One of two provisions must be met under the new diversification requirements. First, no more than twenty percent (20%) of premiums paid to the captive can come from any one policyholder.[12] The definition of "policyholder" includes businesses owned by relatives of the business owner, the spouse of the business owner, or a controlled group of companies.[13] It is not difficult to see how the first diversification provision can severely limit the amount of premiums that can be paid to the captive while staying within the regulations.

However, if the stringent first diversification provision cannot be met, meeting a secondary provision will allow a captive to utilize the § 831(b) election. This provision requires that no heir or spouse of the owner of the insured business owns more than a two-percent greater interest in the captive than in the insured business.[14] For example, if a mother and son both own fifty percent (50%) of an insured business and a captive insurance provider, there is no issue. Yet, if the insured company ownership interests remain at fifty percent (50%) each, but the son owns fifty-five percent of the captive and the mother owns forty-five percent (45%) of the captive,

**The author is a commercial attorney and finance MBA at Rose Law Firm in Little Rock, Arkansas. His practice focuses on commercial transactions and regulated industries. He enjoys hearing your questions, comments and feedback and may be contacted at mgoswami@roselawfirm.com.**

the applicability of the election is destroyed for failure to meet the diversification requirements. This provision is intended to limit a taxpayer's ability to utilize a captive structure that facilitates gift and estate tax savings.

Aside from the new structural requirements mandated by the PATH Act, the IRS issued Notice 2016-66 (the "Notice") which identifies certain captive arrangements as "transactions of interest" and outlines mandatory reporting requirements for taxpayers engaging captive structures. The Notice listed as "transactions of interest" any captive arrangement whereby:

1. A person[15] owns an interest in an entity conducting a trade or business;
2. This business contracts for insurance or reinsurance from a captive entity owned by this person, this person's trade or business entity, or relatives of the person;
3. An § 831(b) election is made by the captive entity;
4. The person or related parties own twenty-percent (20%) or more of the voting power or value of outstanding stock in the captive entity; and
5. One or both of the following apply:
   a. The claim and administrative liability for the captive entity in the preceding five (5) years is less than seventy percent (70%) of premiums earned by the captive (less dividends paid by the captive); or
   b. The captive has in the preceding five (5) years made available for the benefit of the business, the business owner, or related parties any financing, loans, guarantees or transfers of capital that were not treated as a taxable transaction.[16]

*"This is the motivation behind the filing requirements promulgated in the Notice—the IRS wants to ensure it collects adequate information for future governance of captives."*

The Notice includes, as a "transaction of interest," any arrangement "substantially similar" to the above ar-

rangement.[17] If a taxpayer has entered into a transaction substantially similar to the above characteristics at any time after November 2006, there are filing requirements for multiple parties.[18]

*"Though this regulatory structure is the law of the land today, the regulations previously discussed must be taken with many grains of salt."*

The "transaction of interest" moniker stems from the IRS's belief that captive arrangements have been used to bypass tax liability in certain instances. Thus, the IRS wants to collect as much data as possible on how that may have occurred. This is the motivation behind the filing requirements promulgated in the Notice—the IRS wants to ensure it collects adequate information for future governance of captives. For example, the IRS seeks information regarding:

1. Sufficient detail about the arrangement and associated parties such that the IRS can adequately understand the arrangement and know the parties involved;
2. When and how the taxpayer and related participants became aware of the transaction;
3. Why the captive is required to report under the Notice;
4. The authority under which the captive is chartered;
5. A description of all types of coverage provided by the captive;
6. A description of premiums received by the captive;
7. A description of claims paid by the captive;
8. A description of the captive's reserves;
9. A description of assets held by the captive and how it has made use of its premium and investment income.[19]

While the IRS ensured the taxpaying public is aware that it is investigating abusive captive arrangements, it expressly states that it recognizes the existence of legitimate uses for captive insurance. Legitimate uses are those such as risk management.[20] The IRS has no apparent interest in limiting these legitimate captives that are not utilized for the purpose of tax avoidance.[21]

Though this regulatory structure is the law of the land today, the regulations previously discussed must be taken with many grains of salt. After all, these regulations were promulgated under a previous Congress and executive administration. With two of the three federal branches now under the control of Republicans, the IRS may be standing behind enemy lines as to previously enacted regulations. This leaves the future of captive arrangements uncertain. Notwithstanding the uncertainty, if today's compliance burden is surmountable to an interested party, captive arrangements can be very beneficial for entrepreneurs and business owners.

## Endnotes

1. As a practical matter, many large companies have some form of captive insurance arrangement. Any insurance company owned by the insured is a captive. However, most of these arrangements fall outside the scope of the 26 U.S.C. § 831 provisions to be discussed herein.
2. IR-2016-25.
3. *See* Kimberly S. Bunting & Phyllis Ingram, *Captive Insurance for the Middle Market*, J. Accountancy at 58 (Nov. 2016).
4. *See* Gary Fox & Lynn McGuire, *Forming a Captive Insurance Company? Understand the Business and Tax Implications*, Tax Executives Institute (2012), *available at* https://www.tei.org/news/articles/Documents/TTE_MA12_FoxMcGuire_CaptiveIns.pdf.
5. *See* 26 U.S.C. § 831(b)(1). If working with a tax year beginning prior to January 1, 2017, the income exemption is $1.2 million. *See* 26 U.S.C. § 831(b)(1) (2004).
6. *See* 26 U.S.C. § 831(b)(1).
7. *See, e.g.*, *Helvering v. LaGierse*, 312 U.S. 531 (1941).
8. This article does not explore the realm of risk shifting or risk distribution as either concept relates to captive insurance. Substantive law regarding both requirements governs insurance contracts and a fact-intensive analysis of each contract is imperative to review legal compliance. For more information on this, see Chapter 2 of Federal Income Taxation of Insurance Companies (Burnstein 2014).
9. U.S. Pub. L. 114-113.
10. *See* IRS Notice 2016-66 § 1.02(b).
11. *See* 26 U.S.C. § 831(b)(2)(B).
12. *See* 26 U.S.C. § 831(b)(2)(B)(i)(I).
13. *See* 26 U.S.C. § 831(b)(2)(C).
14. *See* 26 U.S.C. § 831(b)(2)(B)(ii). This provision has been described as extraordinarily difficult to decipher. *See* Jay Adkisson, *Congress Makes 831(b) Captives Much Better and Deals with (Some) Abuses in 2015 Appropriations Bill*, Forbes (Dec. 19, 2015), *available at* http://www.forbes.com/sites/jayadkisson/2015/12/19/congress-makes-831b-captives-much-better-and-deals-with-some-abuses-in-2015-appropriations-bill/print/.
15. As used here and in IRS Notice 2016-66, "person" includes legal entities such as trusts and limited liability companies.
16. *See* IRS Notice 2016-66 § 2.01.
17. *See* IRS Notice 2016-66 § 3.01.
18. The May 1, 2017 filing deadline may have passed prior to the printing of this publication because it was submitted in April 2017. *See* IRS Notice 2017-08.
19. *See* IRS Notice 2016-66 § 3.05.
20. *See* IRS Notice 2016-66 § 1.04.
21. *See* IRS Notice 2016-66 § 1.04.

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# Location Independence for In-House Lawyers

By Alexis Lamb

Companies across all business sectors are weighing in on how location independence and alternative work arrangements can maintain a productive workforce while also optimizing employee morale. Location independence is attractive to employees who value flexibility, such as stay-at-home parents, as well as employees who value the freedom to work anywhere with a WiFi connection and a power source. Alternative work arrangements can also eliminate an employee's long commute—hours spent on subways and freeways can be converted into productive work time.

On the employer side, telecommuting reduces the need for renting office space, thereby freeing up capital to service more strategic corporate aims than overhead costs. Providing employees with the option to telecommute has also been shown to result in fewer sick days, increased productivity, decreased corporate travel costs, and more overall employee satisfaction and retention.[1]

*"According to Global Workplace Analytics, at least 50% of the US workforce holds a job that is compatible with telecommuting, and 20-25% of all U.S. workers telecommute at least part of the time."*

Historically, industries such as tech/IT, finance, health care, and sales have embraced remote work environments, with law firms slow to follow. A January 2017 *Forbes* list of the top 100 companies offering work-from-home solutions includes no law firms.[2] However, at least three major law firms—Jackson Lewis[3], Baker & McKenzie, and Morgan, Lewis & Bockius[4]—have joined other industries in introducing telecommuting or alternative work arrangements for their employees as of March 2017. In contrast, IBM—one of the first remote-work pioneers—recently eliminated remote work setups for employees, a move that some considered tantamount to a downsizing effort.[5] With the advent of smartphones and WiFi and a proliferation of apps making remote work an efficient alternative to traditional workplace environments, why don't more remote opportunities exist for lawyers?

## How Can In-House Lawyers and Legal Departments Make a "Deskless" Setup Work?

The gig economy has made it possible for lawyers and other professionals to find freelance legal work, much of which can be done on a remote basis. Many attorneys function as "general outside counsel" to clients with sparse or nonexistent in-house legal teams, handling their legal spillover work on a remote basis. In-house legal departments also rely on legal secondment firms to staff temporary projects, many of which are performed remotely.

But traditional legal employers, including in-house legal teams, are slower to adopt telecommuting setups for their employees. Lawyers venerate tradition—our legal system is based on *stare decisis*: the principle of using past precedent to guide present and future actions and decisions. There's efficiency in reliance on past systems—who wants to draw up a fresh contract to document a new commercial relationship instead of utilizing a template from your in-house library? But lawyers have also been accused of being incapable of innovating,[6] or adopting novel ways by which to deliver legal services.

According to Global Workplace Analytics, at least 50% of the U.S. workforce holds a job that is compatible with telecommuting, and 20-25% of all U.S. workers telecommute at least part of the time. But the statistic that's most indicative of the current U.S. workforce's attitude toward location independence is that *at least 80-90%* of the U.S. workforce would like the opportunity to telecommute, at least part-time.[7]

Let's break that down. 80-90% of U.S. professionals would like the option to telecommute for part of the workweek.

But can this work for lawyers? Sterling Miller,[8] the former General Counsel of Travelocity, argues that if both managers and remote employees have clear expectations and rules that are enforced uniformly and fairly, telecommuting can be used as a tool to engender productivity and morale within in-house legal departments.

## How to Make Telecommuting Work for Legal Employers?

If you are a legal manager or employer faced with the "deskless" dilemma, here are some guidelines to make telecommuting work for you as well as your employees.

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**Designate Certain Days as "In-Office" Days**

This can be as simple as requiring all employees to be in the office a certain number of days a week, or designating periodic all-hands-on-deck team meetings in the form of CLEs or weekly staff updates. Even in the age of Skype, GoToMeeting, Google Hangouts, FaceTime, and other videoconference tech, there is no substitute for in-person interaction. Even in a 100% virtual workplace, periodic team meetings are beneficial to engender a sense of camaraderie and fusion with respect to team objectives.

*"It's tempting to take advantage of a telecommuting situation."*

**Lay Out Clear Expectations and Rules for Remote Employees**

Even though in-house lawyers service only one client, the in-house legal team is essentially a service function for the company. Legal managers must make sure that their telecommuting employees maintain this client-first attitude. Create the expectation that emails, phone calls, and other communications with internal clients must be promptly responded to during regular business hours, and, if required, after-hours and weekends. Frame location independence as a privilege granted for the employee's convenience and make it clear that the remote employee must still be as responsive and respectful of the pace of business as in-office employees.

**Get With the Tech**

Many attorneys still voice discomfort with videoconference technologies and other innovations that are necessary to facilitate a seamless remote working environment, such as Skype, FaceTime, and Google Hangouts. Employers and managers should make sure all employees who want to take advantage of telecommuting arrangements are fluent in videoconference software/apps and all other tools that the company uses to facilitate work, including Lexis/Westlaw accounts and access to company document servers/cloud.

*"Starting your day with little accomplishments—even if they're as picayune as making your bed—helps get you in the frame of mind to take pride in everything else you do for the rest of that day."*

Employers should also ensure that their remote employees have access to a laptop, printer/scanner, smartphone, and all software or hardware they need for a seamless on-the-go workplace environment. For example, Morgan Lewis' telecommute policy provides for a suite of hardware—including dual monitors, docking stations, and headsets—to be set up in all remote employees' work locations.[9]

**Treat All Attorneys Similarly**

If you need to reach out to a telecommuting attorney, use the same methods that you would use to contact an attorney who is two doors down the hall—whether that be Instant Messenger, online chat, email, or picking up the phone. If one of the attorneys on your team is a telecommuter, make sure that he or she is included in all necessary team meetings, conference calls, CLE invitations, and other internal and external communications. If there are offsite retreats or other team-building functions, make sure that telecommuting attorneys are included.

**How to Make Telecommuting Work as an Employee**

If you are an in-house attorney and new to telecommuting, your objective is that of trust—convey to your managers, team members, and internal clients that they can still rely on your contributions in your physical absence.

*"When communicating with teammates or clients, keep distractions to a minimum even if it means having a spare 'office' at the ready in case your usual workspace is compromised."*

**Keep a Client-Service Attitude**

It's tempting to take advantage of a telecommuting situation. There are no supervisors roaming the halls or peering over your shoulder to make sure you're being productive instead of internet shopping, forming your March Madness brackets, or boarding a plane with your passport in hand. Communicate clearly with your supervisors as well as internal and external clients so they know you are responsive, diligent, and completing all assignments in a timely fashion. If your clients expect you to respond to emails within half an hour, it may not be the best idea to go for that midday six-mile run in the park.

**Maintain a Routine**

It doesn't matter if you're in your best bespoke Italian suit or your bathrobe. You're succeeding at working remotely if your supervisors, internal clients, and teammates can rely on the expectation that you'll be as responsive as you would be if you were down the hall. Make sure your calendar is updated and you let your teammates know when you have completed what's expected of you. Starting your day with little accomplishments—even if they're as picayune as making your bed—helps get you in the frame of mind to take pride in everything else you do for the rest of that day.

### Create a Professional Atmosphere

Tele-workers often have to contend with apartment construction, howling animals, violin lessons, internet outages, and all sorts of "life" that can't be dispelled with the click of a mute button. When communicating with teammates or clients, keep distractions to a minimum even if it means having a spare "office" at the ready in case your usual workspace is compromised. If your employer does not provide you with a printer, purchase a multi-function laser printer that has copy-fax-scan capabilities so you can easily sign and scan sig pages and other documents which may require your signature, as well as print and scan documents that may require your comments. Make sure your WiFi is up to speed and that there are no *can-you-hear-me-now* connectivity issues.

### Be Mindful of Tax Considerations

THIS IS NOT LEGAL ADVICE, but talk to a CPA or other tax professional about what you can and cannot deduct with respect to business expenses, including home office-related rent expenses, which your company does not reimburse. If you reside in a different state from your employer, check to make sure you won't be subject to income tax liability in two different states. Again, THIS IS NOT LEGAL ADVICE.

## Conclusion

Working from home is a setup that can enhance productivity and efficiency for both legal employers and attorneys alike if trust is maintained, and communication persists between the telecommuting attorneys, their managers and internal clients.

## Endnotes


1. https://www.entrepreneur.com/article/235285.
2. https://www.forbes.com/sites/laurashin/2017/01/31/work-from-home-in-2017-the-top-100-companies-offering-remote-jobs/#f7caffe42d8a.
3. http://www.americanlawyer.com/id=1202781555470/Two-More-Big-Firms-Prepare-to-Get-Flexible.
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# Crossing the Border in 2017: How In-House Attorneys Can Keep Businesses Out of Hot Water With the Department of Commerce's Bureau of Economic Analysis

By Robert M. Schechter and Christopher F. Schultz

### 2017 Cross-Border Business Structures and Transactions

2017 began with a new U.S. president, the slow installation of a new cabinet, and an immediately heightened focus on the U.S. borders. That focus includes close scrutiny of who and how persons and businesses cross U.S. borders. To stay out of the crosshairs of the current administration and the Federal agencies that work at its direction, in-house counsel, finance and compliance groups are looking for guidance from those professionals who are staying attuned to the evolving regulatory requirements for cross-border business matters.

*"The BE-120 report applies across business sectors to a wide array of business transactions involving the cross-border sale or purchase of services and/or intellectual property related rights and is not dependent upon cross-border business ownership."*

For (i) U.S. businesses that are 10% or more foreign owned; (ii) U.S. persons and businesses that hold a 10% or greater ownership interest in a foreign business, and (iii) U.S. parties that transact with foreign parties for the sale or purchase of services or intellectual property related rights, staying out of hot water includes strict adherence to mandatory filing requirements imposed by the U.S. Department of Commerce ("DOC"). Specifically, the DOC's Bureau of Economic Analysis ("BEA") imposes both transaction-triggered and periodic mandatory reporting requirements upon the aforementioned parties, and their foreign affiliates, through the BEA's foreign direct investment and balance of trade divisions. For reporting purposes, cross-border business ownership is deemed to exist even when ownership is indirect, through intermediate entities. Furthermore, reporting obligations are often due to the BEA with or without notice and failure to file mandatory reports is subject to both civil and criminal penalties pursuant to Section 3105 of title 22 of the United States Code.

### 2017 BEA Reporting Highlights: Focus on U.S. Subsidiaries of Foreign Companies and Cross-Border Services Sector and IP Transactions

Current and upcoming BEA filing deadlines relating to 2017 transactions and data require particular attention for U.S. businesses that are 10% or more foreign owned and U.S. parties that have receipts from, or payments to, foreign parties for the sale or purchase of services or intellectual property related rights. BE-13 filings are presently required by foreign-owned U.S. businesses on a rolling basis. These reports are due within 45 days of a BE-13 report-triggering event, which includes business formations, expansions and acquisitions. For example, a foreign owned U.S. business that purchases new property, leases new space or acquires a product line may be required to report such transactions within 45 days of the occurrence. Also impacting U.S. businesses this year are BE-12 filing requirements, which will be due shortly after year-end. These "benchmark" reports, typically issued on a 5-year cycle, will require foreign-owned U.S. businesses and their foreign owners to submit detailed 2017 financial and operational data. Both BE-13 and BE-12 reports are due with or without individualized notice. The particular BE-13 and BE-12 form that a party is required to submit to the BEA requires a fact specific inquiry into the business structure, relevant financial data and nature of the business transactions of each party.

*"It must also be noted that the BEA takes a very broad view as to whom mandatory BEA reporting obligations apply."*

Similarly, U.S. parties that have receipts from, or payments to, foreign parties for the sale or purchase of services or intellectual property related rights will be required to submit "benchmark" BE-120 reports shortly after the close of 2017. The BE-120 report applies across business sectors to a wide array of business transactions involving the cross-border sale or purchase of services and/or intellectual property related rights and is not dependent upon cross-border business ownership. The BE-120, like the BE-13, is due with or without individualized notice.

## Other BEA Reporting Obligations

BEA reporting obligations include 18 different reports, many of which are comprised of multiple forms. Some forms are triggered by the ownership structure of a business, some by the nature and industry of a business, and others by the types of transactions that U.S. parties engage in with foreign counterparties. These reporting obligations vary considerably from client-to-client and year-to-year, which adds a significant challenge to determining, tracking and timely meeting BEA reporting requirements and deadlines. Following are the 18 different BEA reports and the matters to which they apply:

- BE-9—Quarterly Survey of Foreign Airline Operators' Revenues and Expenses in the United States;
- BE-10—Benchmark Survey of U.S. Direct Investment Abroad;
- BE-11—Annual Survey of U.S. Direct Investment Abroad;
- BE-12—Benchmark Survey of Foreign Direct Investment in the United States;
- BE-13—Survey of New Foreign Direct Investment in the United States;
- BE-15—Annual Survey of Foreign Direct Investment in the United States;
- BE-29—Foreign Ocean Carriers' Expenses in the United States (To Be Reported by Foreign Carriers' U.S. Agents);
- BE-30—Ocean Freight Revenues and Foreign Expenses of United States Carriers;
- BE-37—U.S. Airline Operators' Foreign Revenues and Expenses;
- BE-45—Quarterly Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons;
- BE-120/125—Benchmark & Quarterly Survey of Transactions in Selected Services and Intellectual Property with Foreign Persons Survey Respondents;
- BE-140—Benchmark Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons;
- BE-150—Quarterly Survey of Payment Card and Bank Card Transactions Related to International Travel;
- BE-180/185—Benchmark & Quarterly Survey of Financial Services Transactions Between U.S. Financial Services Providers and Foreign Persons;
- BE-577—Quarterly Survey of U.S. Direct Investment Abroad; and
- BE-605—Quarterly Survey of Foreign Direct Investment in the United States.

*"The BEA achieves its regulatory mission of tracking international commerce and publishing leading economic indicators, including GDP, in part, by imposing the aforementioned reporting requirements on parties engaged in cross-border business structures and transactions."*

It must also be noted that the BEA takes a broad view as to whom mandatory BEA reporting obligations apply. For example, businesses, which are regularly referred to as "business enterprises" by the BEA, are defined by the BEA to mean "any organization, association, branch, or venture which exists for profit-making purposes or to otherwise secure economic advantage, and any ownership of any real estate." Thus, a parent or subsidiary in a multinational business structure as well as a foreign owned U.S. apartment (or U.S. owned foreign apartment) that is not held exclusively for personal use and is at times rented would all qualify as "business enterprises" with BEA reporting obligations under the applicable regulations. Similarly, references to "persons" by the BEA is defined to mean

> any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any state), and any government (including a foreign government, the United States Government, a state or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency).

As a result, parties involved in cross-border business structures, transactions and real estate holdings often fall within BEA regulatory obligations notwithstanding their size or complexity.

## Why the Reporting Burden?

As a principal agency of the U.S. Federal Statistical System, the BEA generates and collects data that has a direct influence on decision-making by government officials, the business community, and individuals. The BEA's economic statistics, with extensive data on the U.S. economy including gross domestic product (GDP) figures, are relied upon for critical decisions affecting

monetary policy, tax and budget projections, and business investment plans. The BEA achieves its regulatory mission of tracking international commerce and publishing leading economic indicators, including GDP, in part, by imposing the aforementioned reporting requirements on parties engaged in cross-border business structures and transactions. The BEA has been a reporting agency in existence for over a century, evolving through various predecessor agencies, beginning as the Division of Commerce and Navigation (1820-1866) and the Bureau of Statistics (1866-1903) within the Department of Treasury and Department of State, and ultimately becoming what it is today as an agency of the Department of Commerce, retitled the BEA in 1972.

### Takeaways

Whether intentionally in the international business arena or not, in-house attorneys across numerous practice areas are increasingly stepping into business structures and transactions that involve interests beyond the borders of their corporate client's home country. Businesses that involve even minor cross-border investments or transactions, such as a minority stock or real estate interest or sale or purchase of services or IP rights, may require special consideration and counseling to avoid harsh penalties for failure to satisfy regulatory reporting requirements. With a new administration and renewed focus on cross-border business ownership and transactions, it is in the best interest of businesses small and large, and their counsel, to be proactive in assessing their current and upcoming BEA filing obligations.

**In his role as Vice President of Porzio Compliance Services, Robert M. Schechter guides individual and business clients on the implementation of systematic data collection, analyses and retention policies in order to ensure U.S. Bureau of Economic Analysis (BEA) compliance. Additionally, as a member of Porzio, Bromberg & Newman, P.C.'s Financial Restructuring and Bankruptcy Department, Mr. Schechter advises stakeholders in business finance, corporate compliance and restructuring matters.**

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# *Qui Tam* Gone Wrong: The Case for False Claims Act Reform

By Stefani Bonato

"*Qui tam* gone wrong." That is how two former U.S. Department of Justice (DOJ) officials described the case of *U.S. ex rel. Harman v. Trinity Industries, Inc.; Trinity Highway Products, LLC*, a False Claims Act (FCA) case that resulted in the largest judgment in the history of the FCA.[1] Currently on appeal in the United States Court of Appeals for the Fifth Circuit, *Trinity Industries* is significant not just because of the size of the judgment, but because it has resulted in across-the-board criticism of the FCA's *qui tam* provisions.

## I. The FCA and Its *Qui Tam* Provisions

The FCA is a federal law that imposes liability on persons and entities that knowingly submit false claims to the government.[2] Under the FCA, a private person (known as a "relator"), who has information that a false claim was submitted, may bring a lawsuit on behalf of the government.[3] The overwhelming majority of new FCA cases are brought by relators—702 in fiscal year 2016 as compared to 143 instituted by the government—and their recoveries far outpace that of government-instituted actions.[4]

*"After all, the very agency to which defendants were alleged to have submitted a false certification issued a written determination that the certification was not false."*

Where a case is filed by a relator, the government is provided with two options: (i) it may intervene and prosecute the case itself or (ii) it may decline to intervene, in which case the individual bringing the action may prosecute it on the government's behalf.[5] In either event, the *qui tam* relator has a significant financial incentive to institute a case: up to 25% of the recovery in intervened cases and up to 30% of the recovery in declined cases is shared with the relator.[6]

Given these strong financial incentives, what protection do companies doing business with the government have against meritless FCA cases? As discussed below, and as demonstrated by *Trinity Industries*, the answer is "not enough."

## II. Overview of *Trinity Industries*

Trinity Industries is a manufacturer of a guardrail end terminal system known as ET-Plus. In *Trinity Industries*, the relator –a direct competitor of Trinity Industries—claimed that Trinity Industries falsely certified compliance with certain Federal Highway Administration (FHWA) regulations when it sold ET-Plus to private contractors paid by state Departments of Transportation who in turn were reimbursed by FHWA.[7]

*"Empirically, DOJ declination does have this effect to some extent. In the aforementioned study, approximately 60% of cases in which the DOJ declined to intervene appeared to have generated no further litigation."*

Contrary to the relator's allegations, FHWA had on multiple occasions issued written determinations that Trinity Industries had in fact fully complied with its regulations. This included a memorandum that was forwarded by the DOJ to relator's counsel in which the FHWA stated that the ET-Plus System has always been and is still eligible for Federal-aid reimbursement.[8] The relator filed suit anyway.

As discussed further below, defendants in *Trinity Industries* filed numerous motions seeking dismissal of the matter. After all, the very agency to which defendants were alleged to have submitted a false certification issued a written determination that the certification was not false. Yet defendants failed in their attempts at dismissal and the case ultimately resulted in a $175 million jury verdict. Under the provisions of the FCA, the U.S. District Court for the Eastern District of Texas trebled the damages and added civil penalties for each of the 16,771 false certifications and $19,012,865 in attorneys' fees and costs for a total assessment against defendants in the amount of approximately $663 million.[9] This is the largest judgment in the history of the FCA.

## III. The FCA's "Protective" Mechanisms Against *Qui Tams* Gone Wrong

The FCA has certain protections built into the statute itself that in theory should either result in early dismissal of meritless actions or discourage the filing of such matters. The sufficiency of these protective mechanisms was recently addressed by the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary, House of Representatives (the "Subcommittee"), which not only found the FCA to already be "replete with protective mechanisms," but also found proposed reforms to the FCA's *qui tam* provisions to be "solutions in search of a problem."[10] The fact that *Trinity Industries*—a case

where the relevant governmental agency issued a written determination that there was no false claim—was not only allowed to proceed, but resulted in the largest award in the history of the FCA—tells us that the Subcommittee got it wrong. Not only are meritless FCA cases a significant problem, but the protective mechanisms against them are ineffective.

### A. Dismissal Authority

One of the most significant mechanisms contained in the FCA that can be utilized to protect companies from meritless cases is the government's authority to unilaterally dismiss a case, subject only to very limited judicial review.[11] This dismissal authority is not only critical to ensuring that only cases with merit move forward, it is also central to the constitutionality of the FCA, because it allows the Executive Branch to retain control over the relator's prosecutorial powers.[12]

*"Yet these judicial safeguards all too often fail to weed out frivolous claims.* Trinity Industries *again serves as the example."*

Yet this dismissal power is used only in the rarest of instances. According to a 2013 study, within a 460-case subsample of *qui tam* cases, the DOJ exercised its dismissal authority in none of the cases examined. When applying standard principles of sampling error, that study concluded that the DOJ exercises its dismissal authority in "no more than roughly 4% of *qui tam* cases and likely far less than that."[13] Why is this the case? The DOJ may view its decision to decline to intervene as an effective means of achieving voluntary dismissal by the relator.[14] Empirically, DOJ declination does have this effect to some extent. In the aforementioned study, approximately 60% of cases in which the DOJ declined to intervene appeared to have generated no further litigation.[15] However, as noted below, the DOJ itself has eroded this "alternate" means of achieving dismissal.

### B. Declination

As previously discussed, declination often signals to the relator that the claim lacks merit.[16] However, similar to the DOJ's underutilization of its dismissal authority, so too has the DOJ partially abandoned the protective mechanism of declination. Despite the fact that the FCA itself only provides the government with two options when presented with a *qui tam* case—intervention or declination—the DOJ has added a third. This third option is a notice of no decision wherein the DOJ neither intervenes nor declines to intervene.[17]

The notice of no decision is a middle of the road approach that does not carry the same negative connotation as a declination and therefore is unlikely to discourage relators from moving forward. This only compounds the impact of the DOJ's failure to exercise its dismissal authority. Whereas before the DOJ could in part justify its failure to dismiss cases on the ground that its declination has a significant deterrent effect of producing voluntary dismissals, its "no decision" policy has eliminated that safeguard. In other words, not only is the DOJ not dismissing cases, it is also no longer encouraging voluntary dismissal through the declination process. The result: more meritless cases making their way to court.

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## IV. Judicial Safeguards

Besides the protective mechanisms contained within the FCA itself, defendants facing FCA *qui tam* litigation can also avail themselves of standard judicial safeguards against meritless cases, including motions to dismiss and motions pursuant to Rule 11 of the Federal Rules of Civil Procedure. In theory, as the Subcommittee pointed out, these judicial safeguards should act as a backstop to meritless FCA cases. Yet these judicial safeguards all too often fail to weed out frivolous claims. *Trinity Industries* again serves as the example.

After their summary judgment motion was denied, the defendants in *Trinity Industries* filed a petition for a writ of mandamus seeking interlocutory review of the denial. While the Court of Appeals for the Fifth Circuit ultimately denied defendants' petition, its decision expressed serious concern over the failure of judicial safeguards, admonishing the trial court's failure to issue a reasoned ruling for rejecting the defendant's motions for judgments as a matter of law given that there exists "a strong argument…that the defendant's actions were neither material nor were any false claims based on false certifications presented to the government."[18]

*"Meritless claims can cost extensive amounts of money even where no litigation has been pursued."*

The trial court in *Trinity Industries* may have failed to exercise its protective powers of dismissal, but the case never should have been in its hands. With the DOJ failing to exercise its power to dismiss *Trinity Industries* and similarly meritless FCA cases and by refusing to decline intervention instead opting to issue notices of no decision, the DOJ has moved judicial safeguards to the first line of defense. This was not, however, the intent of the FCA, which imbues the Executive Branch with superior

authority to dismiss cases. Where the government seeks dismissal, the court must only find that the government's decision to dismiss a *qui tam* suit, even a meritorious one, is supported by a valid governmental purpose that is not fraudulent, arbitrary and capricious or illegal and that there is a rational relation between dismissal and accomplishment of that purpose.[19] Other courts have suggested that the government need not even demonstrate that it has a valid purpose, but that the dismissal authority is almost absolute.[20] Given the differing standards by which a court may dismiss where the government seeks dismissal as opposed to where a defendant does, it is evident that the latter was intended as a failsafe and not the primary safeguard the DOJ, by failing to dismiss or decline, is using it as.

## V. The Cost of Failed Safeguards

The amount of legal fees incurred by the defendants in *Trinity Industries*, a case that even the Court of Appeals for the Fifth Circuit suggests is meritless, is undoubtedly in the tens of millions of dollars. The defendants in *Trinity Industries* are not alone in bearing exorbitant legal fees in defense of meritless *qui tam* cases. A survey of 38 civil FCA suits in which the relator initiated the case, the DOJ declined to intervene and the matter was disposed of either by settlement or by decision of the court, revealed that defendants spent approximately $53,403,000 on external legal costs, while the total recoveries obtained in the matters were only $3,694,484. The average expenditure in outside legal fees in those cases was $1,431,660 and the average recovery was $97,223.[21]

*"One reform not presented to the Subcommittee, but which has been proposed by a number of commentators, is transferring the gatekeeping responsibility from the DOJ to the relevant government agency."*

Meritless claims can cost extensive amounts of money even where no litigation has been pursued. The Subcommittee heard as much from testimony at its April 28, 2016 hearing on *qui tam* reform. Dennis E. Burke, President and CEO of Good Shepherd Health Care System, testified that the company spent $1 million in attorneys' fees in connection with a three-year investigation of a meritless claim made by a *qui tam* relator which was ultimately dropped by the Department of Justice and the State Medicaid Fraud Unit.[22]

The cost of meritless *qui tam* cases is not just borne by corporate defendants. As set forth in the amicus brief filed by the former DOJ officials in *Trinity Industries*, "the [FCA] can be employed abusively to the determinant of the government, the public interest, and private parties."[23] As it relates to the government, meritless *qui tam* actions cost considerable time and money. In 1992, DOJ attorneys spent approximately 200,000 hours investigating 150 *qui tam* cases that were subsequently dismissed or abandoned.[24] The government must also reimburse corporate defendants for certain costs incurred in meritless cases. For example, the Federal Acquisition Regulation permits federal contractors to recover up to 80 percent of its costs of a meritless *qui tam* action in which the government did not intervene.[25] As it pertains to the public interest, and as pointed out in another amicus brief filed in *Trinity Industries*, meritless cases discourage the development of new products or improvements upon current products, which in turn is a detriment to the public.[26]

*"Yet* Trinity Industries *gives corporate defendants more than a reminder of just how dangerous* qui tams *gone wrong can be; it also provides a glimpse at the path to reform."*

*Trinity Industries* shows us that there is wide support for curtailing the abuse of the FCA's *qui tam* provisions, with criticism expressed in the amicus briefs of former government officials, various states, non-profits and others. Perhaps this support, coupled with framing the need for reform of the FCA's *qui tam* provisions not just as a means by which corporate wrongdoers seek to limit liability, but to protect small businesses, the government and the public interest, can produce meaningful reform.

## VI. Potential Reforms to the FCA's *Qui Tam* Provisions

If the climate is right for reform, the next question is what types of reform should be proposed. The Subcommittee rejected reforms that would limit the *qui tam* plaintiff's share of damages and bar actions by employees that did not first report the fraud internally.[27] One reform not presented to the Subcommittee, but which has been proposed by a number of commentators, is transferring the gatekeeping responsibility from the DOJ to the relevant government agency.[28] These commentators offer varying degrees of oversight by the governmental agencies, including giving agencies the type of power currently exercised by the DOJ (the right to control and terminate litigation), giving agencies the power to issue advisory non-binding decisions on the merits of a case, and providing agencies with veto power as well as a number of other gatekeeping roles, each with their own advantages and disadvantages.[29]

Moving the gatekeeping role to the relevant government agency is a reform that could in part be achieved by the Court of Appeals for the Fifth Circuit in *Trinity Industries*. Appellants' argument is essentially that if the government agency (here, FHWA) determines the claim is not false, it cannot otherwise be found to be false under the FCA. To the extent the Court of Appeals finds this to

be the case, the gatekeeping function is, at least to some extent, transferred to the government agency.

Even if legislative or judicial reform cannot be achieved, changing the way FCA *qui tam* actions are being financed, may itself serve as a deterrent against meritless *qui tam* cases. *Qui tam* actions are increasingly being funded through alternative litigation financing ("ALF"). In ALF, investors buy a percentage of future awards in exchange for a smaller amount of upfront investment to help finance the litigation. Since financiers are looking for a return on their investment, in theory they should look to finance only those cases that have a likelihood of success. This is, however, not always the case. In particular, cases that may lack merit, but which are cheaper for defendants to settle than litigate, will generate significant profits for investors and will therefore continue to be funded despite their lack of merit.[30]

## VII. Conclusion

*Trinity Industries*—the largest judgment in the history of the FCA—makes clear that the available safeguards against meritless FCA cases brought by *qui tam* relators have failed. Neither the protective mechanisms provided for in the FCA nor standard judicial safeguards were able to shield the defendants in *Trinity Industries* from the costs of meritless *qui tam* litigation. Yet *Trinity Industries* gives corporate defendants more than a reminder of just how dangerous *qui tams* gone wrong can be; it also provides a glimpse at the path to reform. Criticism of how the FCA's *qui tam* provisions were abused in *Trinity Industries* came from all sides demonstrating that the cost of meritless claims is not just to corporations. It is perhaps this message—that we all lose when protective mechanisms fail and meritless FCA *qui tam* cases are allowed to proceed—that will be the key to achieving reform that protects the government, the public and corporations, big and small, from *qui tams* gone wrong.

## Endnotes

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12. *See*, *e.g. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934-35 (10th Cir. 2005) (noting that the 5th, 6th and 9th and Circuits have concluded that the Government retains sufficient control over *qui tam* actions, including the power to dismiss the action notwithstanding the objections of the relator).
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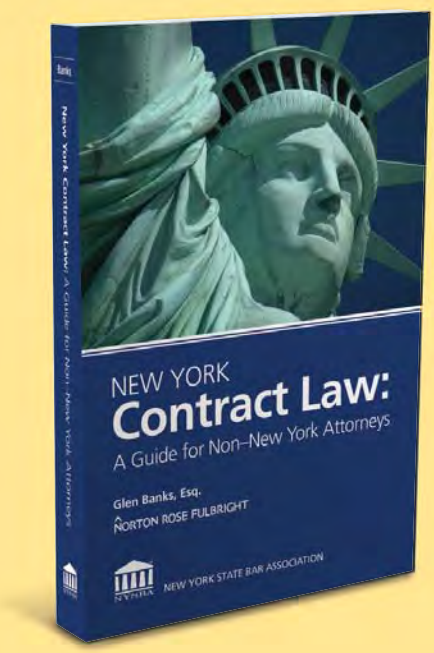


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